

**EFFECT OF THE PRESIDENT'S FY 2013  
BUDGET AND LEGISLATIVE PROPOSALS  
FOR THE OFFICE OF SURFACE MINING  
ON PRIVATE SECTOR JOB CREATION,  
DOMESTIC ENERGY PRODUCTION, STATE  
PROGRAMS AND DEFICIT REDUCTION**

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**OVERSIGHT HEARING**

BEFORE THE

SUBCOMMITTEE ON ENERGY AND  
MINERAL RESOURCES

OF THE

COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

Tuesday, March 6, 2012

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**OVERSIGHT HEARING ON “EFFECT OF THE  
PRESIDENT’S FY 2013 BUDGET AND LEGIS-  
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SURFACE MINING ON PRIVATE SECTOR JOB  
CREATION, DOMESTIC ENERGY PRODUC-  
TION, STATE PROGRAMS AND DEFICIT  
REDUCTION.”**

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**Tuesday, March 6, 2012  
U.S. House of Representatives  
Subcommittee on Energy and Mineral Resources  
Committee on Natural Resources  
Washington, D.C.**

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The Subcommittee met, pursuant to notice, at 10:07 a.m., in Room 1324, Longworth House Office Building, Hon. Doug Lamborn [Chairman of the Subcommittee] presiding.

Present: Representatives Lamborn, Thompson, Benishek, Flores, Johnson, Amodei, Hastings; Holt, Tonko, and Markey.

Mr. LAMBORN. The Committee will come to order. The Chairman notes the presence of a quorum, which under Committee Rule 3(e) is two Members. The Subcommittee on Energy and Mineral Resources is meeting today to hear testimony in an oversight hearing on the effect of the President’s Fiscal Year 2013 budget and legislative proposals for the Office of Surface Mining on private sector job creation, domestic energy production, state programs, and deficit reduction.

Under Committee Rule 4(f), opening statements are limited to the Chairman and Ranking Member of the Committee. However, I ask unanimous consent to include any other Members’ opening statements in the hearing record, if submitted to the Clerk by close of business today.

[No response.]

Mr. LAMBORN. Hearing no objection, so ordered. I now recognize myself for five minutes.

**STATEMENT OF THE HON. DOUG LAMBORN, A REPRESENTA-  
TIVE IN CONGRESS FROM THE STATE OF COLORADO**

Mr. LAMBORN. During today’s hearing, we will hear from the Administration justification for the President’s proposed Fiscal Year 2013 budget for the Office of Surface Mining, including legislative proposals to change the 2006 amendments to Title IV of SMCRA (Surface Mining Reclamation and Control Act) amendments that took 10 years to negotiate and pass, and to impose an abandoned mine lands fee on hard rock mines on each ton of material moved, including non-mineralized rock and soil, frequently referred to as the dirt tax.

Just prior to last year's budget hearing, documents related to the Administration's rewrite of the Stream Buffer Zone Rule had been released to the press. Subsequently, the Natural Resources Committee initiated an investigation of OSM's rewrite of the rule and their relationship to the contractor. As part of the investigation, the Committee has requested information from Secretary Salazar regarding communications between the Interior Department, OSM, and the contractor, and held several oversight hearings on the matter. I anticipate that some Members will ask questions today relating to this ongoing rulemaking.

The budget proposal before us proposes to decrease and/or eliminate funding to the States and Tribes, specifically to the certified States and Tribes, and at the same time advocates for a significant increase in funding for OSM so that you can add an additional 25 employees, full-time equivalents.

So I'm puzzled as to why you would include this statement: "Of the almost 2,400 employees involved in carrying out these two responsibilities on a daily basis, less than 25 percent are employed by OSM. The rest are State and Tribal employees who implement programs approved by the Secretary of the Interior with assistance from OSM. States permit and regulate 97 percent of the Nation's coal production. States and Tribes also complete well over 90 percent of the abandoned mine land reclamation projects."

With the States and Tribes responsible for 97 and 90 percent of the workload created by SMCRA, why does the Federal Government have 25 percent of the personnel? And why does it have the audacity to come before Congress asking us to cut state funding and increase Federal funding so that you can add additional people to conduct the 3 and 10 percent Federal part of those program? This makes absolutely no sense in cost, productivity or function.

That being said, I look forward to hearing from our witnesses today. And I now recognize the Ranking Member from New Jersey, Representative Holt, for his opening statement.

[The prepared statement of Mr. Lamborn follows:]

**Statement of The Honorable Doug Lamborn, Chairman,  
Subcommittee on Energy and Mineral Resources**

During today's hearing we will hear from the Administration justification for the President's proposed FY-2013 budget for the Office of Surface Mining including legislative proposals to change the 2006 amendments to Title IV of the Surface Mining Reclamation and Control Act or SMCRA—amendments that took 10 years to negotiate and pass, and to impose an AML fee on hard rock mines on each ton of material moved including non-mineralized rock and soil—frequently referred to as the dirt tax.

Just prior to last year's budget hearing, documents related to the Administration's rewrite of the Stream Buffer Zone Rule had been released to the press. Subsequently, the Natural Resources Committee initiated an investigation of OSM's rewrite of the rule and their relationship to the contractor.

As part of the investigation the Committee has requested information from Secretary Salazar regarding communications between the Interior Department, OSM and the contractor and held several oversight hearings on the matter. I anticipate that some Members will ask questions today relating to this ongoing rulemaking.

The budget proposal before us proposes to decrease and or eliminate funding to the States and Tribes specifically to the certified States and Tribes (overturn the 2006 Amendments to SMCRA), and at the same time advocates for a significant increase in funding for OSM so you can add an additional 25 FTEs (full time employees).

So I'm puzzled as to why you would include this statement; "Of the almost **2,400 employees** involved in carrying out these two responsibilities on a daily basis, **less**

***than 25 percent are employed by OSM.*** The rest are State and Tribal employees who implement programs approved by the Secretary of the Interior with assistance from OSM. ***States permit and regulate 97 percent of the Nation's coal production. States and Tribes also complete well over 90 percent of the abandoned mine land reclamation projects.***"

With the states and tribes responsible for 97 and 90 percent of the workload created by SMCRA why does the federal government have 25 percent of the personnel and have the audacity to come before Congress asking us to cut state funding and increase federal funding so you can add additional people to conduct the 3 and 10 percent federal part of the program. This makes absolutely no sense in cost, productivity or function.

Thant being said, I look forward to hearing from our witnesses today.

#### **STATEMENT OF THE HON. RUSH HOLT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY**

Mr. HOLT. Thank you, Mr. Chairman. Ostensibly, this hearing is to review the President's proposed budget for surface mining. However, it is apparent that the Majority wants to divert this hearing to another issue. And so I wanted to say a few words about that, because I think their move strikes at the heart of the surface mining law and regulations here in the United States.

The Office of Surface Mining is charged with ensuring that coal mining across the Nation is conducted in a way that protects local communities and the environment. However, at the tail end of the last Administration, the OSM weakened regulations on some of the most destructive mining practices.

During the final days in office, the Bush Administration issued what has come to be known as a Midnight Regulation that revised a regulation known as the Stream Buffer Zone Rule, and removed key protections for streams and rivers threatened by the dumping of mining waste. The Administration's rule then was challenged in court, and the current Administration is now going through a process of issuing a new stream protection rule.

Now, to be clear, mountaintop removal mining has significant adverse impacts on communities and the environment in the Appalachian region. Over the last 30 years, nearly 2,000 miles of Appalachian streams have been filled or spoiled as a result of mountaintop removal activities. The practice has deforested an area the size of Delaware.

An EPA study found that mountaintop removal mining adversely affected aquatic life downstream in 9 out of every 10 streams in the region. And despite these impacts, the Majority has sought to prevent the Obama Administration from issuing new regulations to protect streams and communities in the Appalachian region. The Majority has launched an investigation into OSM's relationship with the contractor, Polu Kai Services, PKS, that was hired in June of 2010 to prepare an environmental impact statement for the rule.

OSM and the contractor mutually agreed to end their relationship in March 2011, before the EIS was complete. Yet the Committee Majority has alleged that the Obama Administration and OSM acted improperly in seeking this separation agreement and in managing the contract. This investigation, it seems to me, is intended only to interfere with the work of OSM.

The Natural Resources Committee Democratic staff has reviewed more than 12,000 pages of documents provided to the Committee

by the Interior Department, and today is releasing the findings of its review in a staff report. This report concludes that the allegations from the Majority are baseless.

Committee Republicans initially asserted that OSM ended its relationship with the contractor because of job loss estimates in the draft EIS, well before any job estimates were done. What is more, mining officials and technical experts from Virginia, West Virginia, Wyoming, and other States were harshly critical of the contractor's work, characterizing draft EIS chapters as "inaccurate, incomplete, erroneous, incorrect," and "insufficient."

The Majority then alleged that OSM provided inappropriate and contradictory instructions to the contractor. However, a review of the materials showed that the facts just do not support the allegations. In fact, the Statement of Work document governing the contractor's work specifically instructed the contractor not to disseminate deliberative documents without prior approval of the OSM contracting officer.

Democratic staff report that this instruction was consistent not only with the Statement of Work, but with longstanding rule-making practice under the Administrative Procedure Act.

It seems clear that the investigation is nothing more than an attempt by the Majority to stop a regulation that is intended to protect Appalachian communities and the environment. In fact, in an attempt to block the stream protection rule, the Majority passed legislation out of this Committee last week that would completely paralyze the Office of Surface Mining.

Any legislation drafted so broadly that it would prevent OSM from issuing any regulation under the Surface Mining Control and Reclamation Act through December of next year, if the regulation would prohibit coal mining in any area, reduce employment in mines, or reduce coal production, is clearly excessive. This means that the law would have an impact well beyond the stream protection rule, could compromise the safety of mining operations, and threatens public health in Appalachia by preventing OSM from issuing or revising numerous regulations.

I look forward to hearing from the director and our witnesses today. Thank you.

[The prepared statement of Mr. Holt follows:]

**Statement of The Honorable Rush Holt, Ranking Member,  
Subcommittee on Energy and Mineral Resources**

In 2011, American crude oil production reached the highest level in nearly a decade. Natural gas production was once again at an all-time high. Some have claimed that this is in spite of, not because of, the Obama Administration.

Yet, the Obama Administration has continued to increase domestic oil and gas production on federal land. Over the first three years of the Obama Administration, oil production from all offshore and onshore federal land has been 13 percent higher than during the last three years of the Bush administration.

Some have claimed that oil production on federal lands is down this year because of the Obama Administration. Well, oil production in 2011 was slightly lower than 2010 as a result of the aftermath of the BP Deepwater Horizon disaster when oil and gas companies were not able to demonstrate that they had the capability to actually respond to and contain a deepwater blowout. And even with that slight dip in offshore production, overall federal oil production in 2011 under President Obama was still higher than each of the last three years of the Bush Administration.

According to a recent Department of Energy report that examined energy production between 2003 and 2011, onshore, oil production from federal land in 2011 was higher than at any point under the Bush Administration.. Over the first three years



of the Obama Administration, natural gas production onshore was 6 percent higher than during the last three years of the Bush Administration.

The Department of the Interior has approved more permits to drill, and industry has begun drilling more wells in the first three years of the Obama Administration than in the first three years of the Bush Administration. Yet these companies are sitting on more than 7,200 approved drilling permits on which they have not begun drilling. Oil and gas companies hold more than 25 million acres of public land onshore on which they are not producing oil and gas. The Obama administration isn't holding up production on these leases, the oil and gas companies who hold these permits are holding up production.

The Administration has once again proposed establishing a fee on these nonproducing leases. Ranking Member Markey and I have introduced legislation to establish an escalating fee on oil and gas leases, providing a strong incentive for oil companies to either start drilling in a timely fashion or relinquish this land so that another company can develop it. If the majority is interested in increasing production on federal lands they should support this legislation to get these companies to stop just sitting on the thousands of approved permits to drill and the tens of millions of acres of public lands they already hold.

And last year there was a 50 percent increase in industry nominations to lease federal land onshore for oil and gas drilling. The oil and gas industry wouldn't be expanding the areas it wanted to drill in if it thought the Obama Administration was not allowing oil and gas development to go forward.

And as part of its real "all of the above" energy strategy, the Obama Administration is also developing renewable energy on public lands, with the goal of permitting 11,000 megawatts by the end of 2013. This would be more than 5 times the amount of renewable energy permitted by all previous administrations combined. Yet the Republican Majority is threatening to raise taxes on the wind industry at the end of this year, which would jeopardize those projects and could kill 37,000 permanent and existing clean energy jobs.

I look forward to the testimony of our witnesses today and I yield back.

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Mr. LAMBORN. OK. I now invite forward The Honorable Joseph Pizarchik, Director of the Office of Surface Mining Reclamation and Enforcement.

Your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to five minutes, as outlined in our invitation to you, and under Committee Rule 4(a).

I know you know how the microphones and the lights work; you have been here before. So you may begin. Thank you for being here.

**STATEMENT OF JOSEPH PIZARCHIK, DIRECTOR, OFFICE OF  
SURFACE MINING RECLAMATION AND ENFORCEMENT**

Mr. PIZARCHIK. Thank you, Chairman Lamborn, Ranking Member Holt. I appreciate the opportunity to be here to testify. Thank you all to other Members of Congress who are here as well. I appreciate the interest that this Committee has shown in the Office of Surface Mining and Reclamation and Enforcement, in our budget, and in our rulemaking. We certainly experience a heightened awareness of the adverse impacts of coal mining that is occurring around the country, and the opportunities to improve the protection of the public and the environment.

The Fiscal Year 2013 budget request has a number of high points. It is a focus budget, it is fiscally responsible, and it is a budget that reflects tough choices and efforts to reduce the Federal deficit.

Some of the discretionary budget highlights include a reduction in funding to the Office of Surface Mining Reclamation and Enforcement for its Federal programs, and on the Indian lands by \$3.4 million, for the review and administration and enforcement of

permits. We intend to offset that reduction with collection for services provided to the industry. The cost recovery will occur after OSM promulgates regulations through the rulemaking process to update its fee structure.

There is also a \$10.9 million reduction in regulatory grants to the States. The States are, again, encouraged to recover their costs from the industry for services they provided to the industry.

Mr. Chairman, you had asked a question earlier as to why we would propose those types of reductions. Those reductions, both to the States and to OSM, are designed to lower the Federal spending, to reduce the deficit of this country, by recovering from the industry more of the cost of the services that we provide to the industry. To eliminate those, reduce those subsidies to the industry.

These two reductions are also a part of the larger government-wide effort to lower the Federal spending elsewhere. The budget proposal for OSM also includes administrative cost savings and management efficiencies to support the President's government-wide campaign to cut waste, primarily in the areas of travel, strategic sourcing of supplies and materials, and other goods and services. It provides for fully funded fixed costs, which includes a one-half of one percent pay increase for the employees, as well as costs to pay for the higher insurance costs for our employees and other related employer costs.

As regards your question about the additional staff to OSM, as you may have heard over the past 10 years, not including this current fiscal year, OSM staff has been reduced by 17 percent. If you include the cut from last year, this current fiscal year is down about 18 percent. Over the last 20 years, we have almost 48 percent fewer employees, and we are still doing the same work. The additional staff is needed to be able to carry out our statutory obligations, our obligations to provide technical support and training and assistance to the States, our obligation to conduct oversight to provide assurances to the public, to Congress, to everybody, that we have an incredible oversight program to make sure that the laws are being implemented, as required across the country. Without the additional staff, we do not have the resources to be able to do all of the tasks assigned to this agency by Congress.

In regards to other reductions, for example in the mandatory spending program, the Administration's 2013 budget proposal for OSM includes a legislative proposal similar to last year's to reduce unnecessary spending, and that includes the three components: the termination of payments to the certified States and Tribes who certified they have completed their coal reclamation, as well as a change to the program to provide for a more directed spending of those funds to address the most dangerous sites in the country.

It also creates a proposal for a parallel program to reclaim abandoned hardrock mines. There are States interested, many of which have very dangerous problems in their areas. We believe that the best approach is to provide for a comprehensive solution to address those abandoned mine land problems in the hardrock area with the fees being paid by the hardrock industry.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pizarchik follows:]

**Statement of Joseph G. Pizarchik, Director, Office of Surface Mining  
Reclamation and Enforcement, U.S. Department of the Interior**

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify on the Fiscal Year 2013 budget request for the Office of Surface Mining Reclamation and Enforcement (OSM).

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Office of Surface Mining Reclamation and Enforcement for two basic purposes: First, to assure that the Nation's coal mines operate in a manner that protects citizens and the environment during mining operations and restores the land to productive use following mining; and second, to implement an Abandoned Mine Lands (AML) program to address the hazards and environmental degradation remaining from two centuries of unregulated mining. These tasks are vital to public health and safety, and the environmental and economic well-being of the United States.

Congress charged OSM through SMCRA to ensure that the Nation strikes a balance between the protection of the environment and the Nation's need for coal energy. Nearly 35 years after the passage of SMCRA, coal remains an important fuel source for our country, providing about half of our Nation's electricity. In the continued drive to decrease our Nation's dependence on foreign oil, coal will continue to be part of our domestic supply of energy for the foreseeable future.

While new energy frontiers are being explored, including the development of clean coal, the coal supply (conventional coal production) is essential to the Nation's energy requirements. In order to ensure that coal is produced in an environmentally conscious and responsible way, OSM is committed to carrying out the requirements of SMCRA in cooperation with States and Tribes. Of the almost 2,400 employees involved in carrying out these two responsibilities on a daily basis, less than 25 percent are employed by OSM. The rest are State and Tribal employees who implement programs approved by the Secretary of the Interior with assistance from OSM. States permit and regulate 97 percent of the Nation's coal production. States and Tribes also complete well over 90 percent of the abandoned mine land reclamation projects.

The major tasks for OSM are to ensure that States and Tribes successfully address coal mining activities by ensuring they have high-quality regulatory and AML frameworks and to oversee implementation of their programs. Importantly, OSM also provides technical assistance, funding, training, and technical tools to the States to support their regulatory and reclamation programs.

Currently, 24 States have approved regulatory programs in place pursuant to Title V of SMCRA. There are 25 States and three Tribes that administer approved AML programs pursuant to Title IV of SMCRA.

Since enactment of SMCRA in 1977, OSM has provided more than \$3 billion in grants to States and Tribes to clean up mine sites abandoned before passage of SMCRA. In the course of addressing health, safety and environmental hazards, about 265,000 acres of Priority 1 and 2 abandoned coal mine sites have been reclaimed under OSM's AML Program, though many sites still remain.

The authority to collect and distribute the AML reclamation fee was revised by the Tax Relief and Health Care Act of 2006, which included the 2006 Amendments to SMCRA (Public Law 109-432). Among other things, these amendments extended the authority for fee collection on mined coal through September 30, 2021, and changed the way that State and Tribal reclamation grants are funded, beginning in FY 2008. State and Tribal grants are funded by permanent appropriations that are derived from current AML fee collections and the general fund of the U.S. Treasury. With these amendments, funding to States and Tribes increased from \$145.3 million in FY 2007 to the most recent distribution made available of \$485.5 million for FY 2012.

The budget includes a legislative proposal to reform the AML reclamation program to reduce unnecessary spending and ensure the Nation's highest priority abandoned sites are reclaimed. First, the budget proposes to eliminate the unrestricted payments to certified States and Tribes that have completed their abandoned coal mine reclamation. Terminating these payments will save taxpayers \$1.1 billion over the next decade. Second, the budget proposes to reform the allocation of grants for coal AML reclamation to a competitive process. The current production-based formula allocates funding to States that have the most coal production and not necessarily States with the most critical reclamation needs. A competitive process would ensure that funding addresses the highest priority and the most environmentally damaging AML coal sites across the Nation, regardless of which State they are located in and how much coal is currently produced.

Third, the budget proposes to create a parallel hardrock AML program, with fees collected by OSM and distributed competitively by the Bureau of Land Management.

The coal AML reclamation program would operate in parallel to the proposed hardrock AML fee and reclamation program, as part of a larger effort to ensure that the Nation's most dangerous coal and hardrock AML sites are addressed by the industries that created the problems. The mandatory distribution to the United Mine Workers of America (UMWA) health benefit plans, estimated at \$230.6 million in FY 2013, will not be affected by this proposal.

#### **Fiscal Year 2013 Budget Request Overview**

The FY 2013 budget request for OSM totals \$140.7 million in discretionary spending and supports 528 equivalent full-time positions. Compared with the 2012 enacted level of \$150.2 million, this represents a net decrease of \$9.5 million. The budget request contains a programmatic increase of \$4.2 million for improved implementation of existing laws and support to States and Tribes, and monitoring of AML projects. Reductions include \$10.9 million in discretionary spending for State regulatory program grants to be offset with increased user fees for services provided to the coal industry; \$3.4 million in Federal programs, including the Federal program for Indian lands, to be offset with cost recovery of fees for services, and \$0.3 million for watershed cooperative agreements. The budget includes a net increase of \$0.9 million for fixed costs and continues to support administrative savings and efficiencies.

OSM's budget also contains an estimated \$537.2 million in permanent appropriations. This spending includes \$306.6 million for reclamation grants to non-certified States and Tribes (those with remaining abandoned coal mine problems); and \$230.6 million for the UMWA for specified health benefits plans. This spending is derived from both the AML and U.S. Treasury funds. The estimates, as contained in the budget submission, are projections based on information current as of the end of the 2011 calendar year and subject to change since they are based on fee collections and requests from the UMWA.

#### **Regulation and Technology Appropriation**

The OSM's overall FY 2013 request includes \$113.1 million for the Regulation and Technology appropriation, \$9.7 million below the 2012 enacted level. This includes an increase in funding and staff to support improved implementation of existing laws and support to States and Tribes, and reductions for regulatory grants, and Federal programs where OSM is the regulatory authority. The FY 2013 budget request will enable OSM to provide financial and technical support, and training to the 24 States with approved regulatory programs. It will also enable OSM to continue to administer Federal regulatory programs in States that do not operate their own programs and on Federal and Indian lands.

The requested programmatic increase of almost \$4.0 million and 25 FTE will support improved implementation of existing laws and support to the States and Tribes. Scientific developments have identified areas in need of improvement to more completely implement SMCRA. Annual performance agreements developed for each State, with stakeholder input, outline the responsibilities and activities of both the State and OSM. The increase in funding and FTE will strengthen OSM's skill base to assist in resolving issues, while continuing to provide the technical support and training that States and Tribes need to maintain program effectiveness.

A large portion of the regulatory and technology funding appropriated to OSM is distributed to the States and Tribes in the form of regulatory grants. These grants account for 51 percent of this proposed appropriation. For FY 2013, the request includes \$57.7 million for regulatory grants, \$10.9 million below the 2012 enacted level. States are encouraged to offset the decrease in Federal funding by increasing cost recovery fees for services to the coal industry, therefore there should be no reduction in regulatory performance. The decrease supports the Administration's commitment to reduce subsidies to fossil-fuel industries.

In addition, a decrease of \$3.4 million for Federal regulatory programs where OSM is the regulatory authority is proposed, which will be covered by an equal amount of proposed offsetting collections for the review, administration and enforcement of coal mining permits.

The remaining portion of the budget provides funding for OSM's regulatory operations on Federal and Indian lands, evaluation and oversight of State regulatory programs, technical training and other technical assistance to the States and Tribes as well as administrative and executive activities.

### **Abandoned Mine Reclamation Fund Appropriation**

The request includes \$27.5 million for the AML appropriation, which is a net increase of \$149,000 from the 2012 enacted level. The budget supports OSM's program evaluations and reclamation operations, watershed cooperative agreement projects, fee compliance and audits, technical training and other technical assistance to the States and Tribes as well as administrative and executive activities. Increases are proposed for project monitoring of AML projects. Reductions are proposed for watershed cooperative agreements due to the anticipated number of projects in FY 2013 and available carryover funding to support them.

### **Permanent Appropriations**

The OSM will continue to distribute mandatory funding to States and Tribes under the AML program and make payments to the UMWA health benefit plans. The budget request includes a legislative proposal discussed earlier to eliminate payments to certified States and Tribes and restructure AML coal payments from a production-based formula to a competitive process, allocating \$306.6 million in 2013 for reclamation of the highest priority coal AML sites in the Nation. This proposal will save an estimated \$1.1 billion over the next decade while ensuring that the Nation's highest priority abandoned coal mines are addressed.

### **Offsetting Collections and Fees**

OSM's budget continues an offsetting collection initiated in FY 2012, allowing OSM to retain coal mine permit application and other fees for the work performed as a service to the coal industry. The fee will help ensure the efficient processing, review, and enforcement of the permits issued, while recovering some of the regulatory operations costs from the industry that benefits from this service. Section 507 of SMCRA authorizes this fee. It is estimated that \$3.4 million will be generated in offsetting collections.

### **Conclusion**

The FY 2013 budget is a disciplined, fiscally responsible request that lowers the cost to the American taxpayer while ensuring coal production occurs in an environmentally responsible way.

Thank you for the opportunity to appear before the Committee today and testify on the FY 2013 budget request for OSM. This concludes my written statement. I am happy to answer questions that you may have on the budget proposal.

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### **Response to questions submitted for the record by The Honorable Joseph Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior**

#### **Subcommittee Chairman Doug Lamborn**

#### **1. Can you tell this Committee specifically how much money OSM has spent on the rewrite of the 2008 Stream Buffer Zone Rule?**

Answer: The Office of Surface Mining Reclamation and Enforcement (OSM) has been developing improvements of its regulations to more completely implement the Surface Mining Control and Reclamation Act by better protecting streams from the adverse impacts of coal mining while helping meet the nation's energy needs. Since 2009, OSM has spent about \$7.7 million to develop this rulemaking.

#### **2. Can you tell us how much more money will be needed to finish the rule?**

Answer: No. There are too many factors that will impact future costs such as the number and complexity of public comments received, the number of public hearings held, etc.

#### **3. How much more money will it cost the government to renegotiate a second settlement and does that include paying attorney fees to the plaintiffs?**

Answer: The government has no current plans to negotiate a second settlement.

### **Specific Questions re: Cost Recovery/User Fees**

OSM has requested an amount for state Title V regulatory program grants in FY 2013 that reflects an \$11 million decrease from FY 2012. While OSM does not dispute that the states are in need of an amount far greater than this, the agency has suggested once again that the states should be able to make up the difference between what OSM has budgeted and what states actually need by increasing cost recovery fees for services to the coal industry.

**1. What exactly will it take to accomplish this task?**

Answer: Each state has the legal authority to collect a fee from the applicant to cover up to the actual or anticipated cost of reviewing, administering, and enforcing the permit. How that would be accomplished would depend on the circumstance and processes of the individual states.

**2. Assuming the states take on this task, will amendments to their regulatory programs be required?**

Answer: It depends on the individual state. Federal law did not require states to develop programs that require a program amendment to modify their fee structure. Those states that chose to include such a constraint on their authority may need to amend their program and those states that did not elect to include such a constraint on their authority can adjust their fees without a program amendment.

**3. How long, in general, does it take OSM to approve a state program amendment?**

Answer: The amount of time that it takes to process a state program amendment varies depending on the number of issues in each amendment. In addition to internal review and clearance within OSM and the Department, all state program amendments require publication of a proposed rule in the Federal Register, an opportunity for public comment, and then publication of a final rule in the Federal Register. Between 2007 and 2010, OSM processed three state program amendments dealing with fees; the average number of days for processing was 237.

The state of Alabama submitted a program amendment to OSM in May of 2010 to raise current permit fees and authorize new, additional fees. It took OSM a full year to approve this amendment, resulting in lost fees of over \$50,000 to the state.

**1. If OSM is unable to approve requested state program amendments for permit fee increases in less than a year, how does the agency expect to handle mandated permit increases for all of the primacy states within a single fiscal year?**

Answer: The proposed FY 2013 budget for OSM does not mandate permit fee increases for any state. Section 507(a) of the Surface Mining Control and Reclamation Act (SMCRA) specifies that "[e]ach application for a surface coal mining and reclamation permit pursuant to an approved State program. . . shall be accompanied by a fee as determined by the regulatory authority." The amount charged is left to the state, however. In addition, states are encouraged to recover the cost of other services they provide. How individual states choose to recover the cost of services they provide to the industry is a matter of the state's discretion. Some state programs specify the permit fee amounts in the state program. Any change to the fee amounts, therefore, requires a state program amendment. Other states have set out permit fees according to a schedule that is separate and apart from the state program, in which case fee changes do not require a state program amendment.

**2. If OSM is not expecting to pursue this initiative in fiscal year 2013, why include such a proposal in the budget until OSM has worked out all of the details with the states in the first instance?**

Answer: As early as February 2010, states have been encouraged to adjust their fees to recover more of the cost of the services they provide to industry. The FY 2011, FY 2012, and FY 2013 budget proposals for OSM have all included the proposed reduction in Federal spending. The FY 2013 proposal includes a similar reduction of \$3.4 million for OSM's regulatory programs. OSM is pursuing a rulemaking to adjust its fees to recover the costs of reviewing, administering and enforcing permits for Federal programs. OSM anticipates that this rulemaking will become effective in fiscal year 2013. Moreover, in response to requests from the states and in order to reduce Federal spending, OSM is exploring all available options to assist primacy states in the collection of fees.

**3. What types of complexities is OSM anticipating with its proposal at the state level? Many of the states have already indicated to OSM that it will be next to impossible to advance a fee increase proposal given the political and fiscal climate they are facing.**

Answer: States are encouraged to follow OSM's example and recover more of the cost of the services provided to industry and reduce state spending as OSM will reduce Federal spending.

OSM's solution seems to be that the agency will propose a rule to require states to increase permit fees nationwide.

**1. Won't this still require state program amendments to effectuate the federal rule, as with all of OSM's rules?**

Answer: OSM has no plans to propose a rule requiring states to increase permit fees.

**2. How does OSM envision accomplishing this if the states are unable to do it on their own?**

Answer: Beginning as early as February 2010, states were encouraged to adjust their fees to recover more of the cost of the services they provide to industry. The FY 2011, FY 2012, and FY 2013 budget proposals for OSM all included the proposed reduction in Federal spending. OSM stands ready to assist any States that elect to adjust their fees and request assistance in their efforts to do so.

**3. Even if a federal rulemaking requiring permit fee increase nationwide were to succeed, how does OSM envision assuring that these fees are returned to the states?**

Answer: OSM does not intend to propose a rulemaking to require permit fees be increased nationwide. Rather, states have asked OSM to collect fees on their behalf. OSM is exploring all legal and practical options for providing such assistance to the states, including the remittance of such fees to the states.

**4. Will OSM retain a portion of these fees for administrative purposes?**

Answer: Because OSM is still considering the resources and legal authorities it has to address the request from the states to assist in the collection of fees, we do not yet know how we will accomplish this objective. Many options are under consideration.

**Congressman Glenn 'GT' Thompson**

**1. What is OSM's current costs for administering the programs in the two federal program States, Tennessee and Washington, and on Indian lands for which you will be seeking reimbursement? And what does this amount to on a per-ton of coal basis?**

Answer: OSM spends about \$4.7 million per year of Federal taxpayer funds to review permit applications and administer and enforce coal mining permits in two Federal program states (Tennessee and Washington) and on Indian lands where OSM is the regulator. The \$4.7 million is based on the best available actual cost data. The actual cost will vary based upon the number of permits, revisions, etc., that are processed, administered, and inspected in any given year.

It is difficult to calculate and fairly assign the cost on a per-ton basis. Each permit's cost per-ton changes through the lifecycle and circumstances of the permit.

**Congressman Mike Coffman**

**1. You stated in your testimony that we must rely on domestic supply of coal in order to reduce our dependence on foreign oil but how will increasing fees on coal production increase our supply? Won't the effect of these increased fees be a reduction of production and supply? Therefore, increasing the cost of energy for families?**

Answer: OSM plans to revise its rules to recover from the coal industry much of the cost that OSM incurs in reviewing, administering, and enforcing mining permits on lands where OSM is the regulatory authority. OSM intends to recover its costs for these activities in Federal Program States and on Indian Lands. OSM's proposal neither increases fees on coal production nor mandates permit fee increases for any state that has assumed primary responsibility for regulating surface coal mining operations within its borders. Those states are encouraged to recover from the permitted mine operator the cost of the services that the states provide. How individual states choose to recover those costs, however, is a matter left to each state's discretion.

OSM does not believe that a cost recovery rulemaking will lead to a reduction in the Nation's supply of coal.

**2. Your budget states that the FY 2013 budget is a disciplined, fiscally responsible request that lowers the cost to the American taxpayer while ensuring coal production occurs in an environmentally responsible way. However, isn't the reality that the increased "fees" will be passed onto the consumer?**

Answer: The proposed Fiscal Year 2013 budget for OSM does not mandate permit fee increases for any state. States are encouraged to recover the cost of services they

provide from the permitted mine operator, but it is a matter left to the state's discretion.

The Federal Government currently provides funding to States and Tribes to regulate the coal industry. To eliminate a de facto subsidy of the coal industry, the budget encourages States to increase their cost recovery fees for coal mine permits. With additional funding from fees, the States will need less Federal grant funding, so the budget reduces grant funding accordingly.

- 3. OSM proposes to reduce the budget by "\$10.9 million in discretionary spending for State regulatory program grants" and this is to be "offset with increased user fees for services provided to the coal industry". Which states do you anticipate will have to increase their fees to compensate for the loss of this federal revenue? Also, how will these increased fees (taxes) impact the economic viability of the coal industry?**

Answer: The proposed FY 2013 budget for OSM does not specify how a state ought to offset its reduced regulatory grant amount. States are encouraged to recover the cost of services they provide from the permitted mine operator, but it is a matter left to the state's discretion.

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Mr. LAMBORN. All right, thank you. We have also been joined by the Chairman of the Full Committee, and both for him and the Ranking Member of the Full Committee, we will give them the courtesy of a five-minute opening statement when they appear.

So I now like to recognize Representative Hastings of Washington.

**STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

Mr. HASTINGS. Thank you very much, Mr. Chairman, for the courtesy.

Over this past year, Chairman Lamborn and I have patiently and respectfully worked to conduct oversight into the sudden decision to reopen a multi-year stream buffer rulemaking, and push forward with new regulations in a rushed time frame. Since this oversight investigation started last February, the scope has expanded beyond just the decision to reopen rulemaking, but to broader actions that include contractor dismissals and how the rulemaking is being managed or mismanaged.

This is a serious matter that impacts the livelihood of entire communities, the jobs of thousands of coal miners across the Nation, and the cost of life for Americans that depend on coal for electricity. Not only are real coal jobs and the cost of electricity at stake, but the agency is spending unknown sums of taxpayer dollars pursuing this rewrite. And the spending is climbing higher, due to the highly questionable way it is being managed.

For more than a year, through a series of letters sent to you, Director Pizarchik, and Secretary Salazar, this Committee has sought information, communications, and documents. Not once over the last year has a single deadline been met, and the Administration continues to withhold the vast majority of requested materials. This occurs despite your pledge of transparency at your confirmation hearings for this post, for the Department of the Interior's promoting their commitment to transparency and open government, and President Obama's declaration that transparency would be a "touchstone" of his Administration.

Congress and this Committee have an obligation to the American people to conduct oversight of the executive branch and get an-



swers to questions that are asked. We take this charge very seriously. Great patience and diligence has been shown on our part for over a year, as we have asked for information and documents. But there comes a time when we are left with no other choice but to tell the Department to produce these documents. That time is just about upon us.

It shouldn't take a subpoena to get straight answers and documents. But if that is what it takes to get the Obama Administration to comply, then I am prepared to take that step.

With that, Mr. Chairman, I yield back my time.

[The prepared statement of Mr. Hastings follows:]

**Statement of The Honorable Doc Hastings, Chairman,  
Committee on Natural Resources**

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This is a serious matter that impacts the livelihood of entire communities, the jobs of thousands of coal miners across the nation, and the cost of life for Americans that depend on coal for electricity. Not only are coal jobs and cost of electricity at stake, but the agency is spending unknown sums of taxpayer dollars pursuing this rewrite, and the spending is climbing higher due to the highly questionable way it's being managed.

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Congress and this Committee have an obligation to the American people to conduct oversight of the Executive Branch and get answers to the questions that are asked. We take this charge seriously. Great patience and diligence has been shown on our part, for over a year, as we've asked for information and documents, but there comes a time when we're left with no other choice but to compel the Department to produce these documents. That time is just about upon us. It shouldn't take a subpoena to get straight answers and documents, but if that is what it takes to get the Obama Administration to comply, then I'm prepared to take that step.

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Mr. LAMBORN. All right, thank you. We will now have questions from the members of the Committee, and I will begin.

Mr. Pizarchik, as you know, this Committee has been investigating the rewrite of the 2008 stream buffer zone rule, as was just mentioned by the Chairman, specifically why this rewrite was initiated, how the rulemaking process itself is being managed, whether the political implications of the rule are unduly influencing the process, and the impacts the proposed rule will have on jobs, the economy, and coal production. Those are the concerns that we have.

OSM has admitted spending over \$4.4 million on the Environmental Impact Statement for this rule alone by contract, and in 2005 several agents managed to produce a 5,000-page programmatic EIS, including 30 Federally funded studies on all aspects of surface mining for about the same amount.

Can you tell this Committee specifically how much money OSM has spent on the rewrite of the 2008 stream buffer zone rule?

Mr. PIZARCHIK. Mr. Chairman, in regards to the spending on the EIS, we hired a contractor, as you are aware. And of that contractor—if you bear with me—we had provided some numbers to you previously. And under the contract, the original amount was for \$4.98 million that was awarded to PKS. The final amount that we paid to them was \$3.7 million, leaving a balance of \$1.28 million.

After PKS and the Office of Surface Mining ended their contractual relationship, we hired Industrial Economics and awarded them a contract for \$925,261. And there have been some modifications to that, I believe totaling about \$569,000 on that. As far as the tracking on the amount of time that OSM has spent on it, and our costs, I don't have those figures for you, but I think we could provide, as best we can, information we have and a response to the question for the record.

Mr. LAMBORN. Yes, we would like more information on that, thank you.

How much more money will be needed to finish the rule?

Mr. PIZARCHIK. I don't know specifically how much more. I believe we have the provisions in place with the contract. It should complete the work, as I understand it. But again, I have to double-check on that to see if there is other work that is anticipated. And it is hard to estimate exactly how much more time would be involved for the staff, because once we were to publish the proposed rule and draft EIS, we expect that there will be significant input from the public, from industry, and from the citizens who are affected by mining with their comments. Dependent on the scope and the quantity of comments, that could have a direct relation to how much additional work would be necessary to complete the rule and finalize it.

Mr. LAMBORN. OK. Do you anticipate finalizing this new rule by June 29th of this year?

Mr. PIZARCHIK. No.

Mr. LAMBORN. OK. What do you estimate the time frame to be?

Mr. PIZARCHIK. I don't have an estimate on the time frame at this point. We are working on the rule. We do not yet have a proposed rule ready for publication. And we have to complete all of those matters, and we have the internal process we have to go through, the standard process, to get a published rule out. We have hopes of getting it out later this year, maybe this spring.

Mr. LAMBORN. OK. How much more money will it cost the government to renegotiate a second settlement? And does that include paying attorneys' fees to the plaintiffs?

Mr. PIZARCHIK. I don't believe that there is a need for a second settlement, so I don't have any anticipation that any additional money would be necessary. Under the terms of the original settlement, we committed to making our best effort to get the proposed rule out, I believe it was, last year.

Our best efforts have not been successful in meeting that. The litigation has not been resumed. There has not been any litigation. We are continuing to make our best efforts to proceed and get a proposed rule published, and to get a rule finalized.

Mr. LAMBORN. OK, thank you. At this point I would like to recognize the Ranking Member of the Full Committee for five minutes.

Mr. MARKEY. Thank you, Mr. Chairman, very much. Mr. Director, last week the Majority passed legislation that they claimed was aimed at the stream protection rule. Yet that legislation is drafted so broadly that it could likely prevent OSM from issuing almost any regulation.

The legislation states, "The Secretary of the Interior may not, before December 31, 2013, issue or approve any proposed or final regulations under the Surface Mining Control and Reclamation Act of 1977 that would adversely impact employment in coal mines in the United States, cause a reduction in revenue received by the Federal Government or any State, Tribal, or local government, by reducing, through regulation, the amount of coal in the United States that is available for mining, reduce the amount of coal available for domestic consumption, for export, or designate any area as unsuitable for surface coal mining and reclamation operations."

Do you believe, Mr. Director, that this legislation would have impacts for OSM that would extend well beyond the stream protection rule, and that could impair OSM's ability to protect safety and the environment?

Mr. PIZARCHIK. Yes, I do, sir.

Mr. MARKEY. And could you explain what you believe those impacts would be?

Mr. PIZARCHIK. There is a number of them. We are beginning the process to modify regulations for the placement of coal ash at coal mine sites, both active and abandoned. That would adversely impact those regulations. We have an attempt to modify regulations on temporary cessations that have not been updated since 1979. We believe that would adversely impact our ability to address those as well.

And in regards to States, if there are state program amendments, those need to come through for approval by OSM, and that would also adversely impact our ability to process those program amendments to carry out our statutory responsibilities.

Mr. MARKEY. OK. Well, Mr. Director, the purposes of the Surface Mining Control and Reclamation Act, as outlined in section 102(f) of that law, is to "strike a balance between protection of the environment and agricultural productivity and the nation's need for coal as an essential source of energy." Would prohibiting any rule-making, based upon the criteria in H.R. 3409, be inconsistent with the purposes of the Surface Mining Control and Reclamation Act?

Mr. PIZARCHIK. Yes. That would prohibit us from striking that balance to take into consideration all the purposes of the statute.

Mr. MARKEY. Mr. Director, could H.R. 3409 prevent the Office of Surface Mining from approving state program amendments to improve mine reclamation bonding programs, which could adversely affect the ability of States to ensure that the necessary funds are available to reclaim mine sites?

Mr. PIZARCHIK. Yes, that could have that impact. And, in fact, there are some States right now where there are some bonding issues that need to be addressed.

Mr. MARKEY. And this law potentially could interfere with that.

Mr. PIZARCHIK. Yes, it could.

Mr. MARKEY. And what would the impact of that be?

Mr. PIZARCHIK. The impact of that would be that there would be inadequate funds to reclaim the sites if the operator were to go into bond forfeiture, which would prohibit the land from being restored to productive use, adversely impacting the economies of those people and the livelihood of the people where those lands could not be restored.

Mr. MARKEY. Which States are we talking about?

Mr. PIZARCHIK. Primarily Kentucky right now, sir.

Mr. MARKEY. And so the State of Kentucky would be limited, in terms of what it could do.

Mr. PIZARCHIK. Yes, because changes that they would need to make would have to be approved by us, and that could not occur if this bill were passed.

Mr. MARKEY. And could H.R. 3409 prohibit OSM from developing guidelines and requirements for the use of coal combustion residues for reclamation activities on active and abandoned coal mine sites? A regulation would actually reduce costs for the mining industry.

Mr. PIZARCHIK. Yes, sir. It could do that, as well. We want to update our regulations to provide clear guidance to protect the environment and to allow coal ash to be beneficially used where it is appropriate.

Mr. MARKEY. OK, great. Thank you so much, sir. Thank you, Mr. Chairman.

Mr. LAMBORN. All right, thank you. We will now continue with our questions by members of the Committee. I would note that Ranking Member Holt is at another hearing. There are a lot of hearings going on at this moment. If he gets back here before the end of the hearing, he will be able, obviously, to ask his questions.

But I would now like to recognize Representative Johnson of Ohio.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Pizarchik, OSM's Federal Register notice in June of 2010 stated—and I quote—"We had already decided that—to change the rule following the change of the Administration on January 20, 2009." Additionally, there are internal OSM documents that state, "OSM had already begun developing a revised rule, following the change of Administration on January 20, 2009."

So, according to internal OSM documents, not only was the decision made to change the rule upon the change of the Administration, work had begun on the rewrite when the Administration changed. While this decision to change the rule was made before you took your position as director, can you tell me when, precisely, was the decision made to throw out the 2008 rule and significantly expand the scope of the 2008 rule?

Mr. PIZARCHIK. My understanding, Congressman Johnson, is that the decision to revise the regulation was made after the courts denied the Administration's request to vacate the 2008 rule. And instead, the court indicated if changes wanted to be made, they had to go through the rulemaking process. I believe that occurred in the summer of 2009.

Mr. JOHNSON. But that conflicts with what is in the Federal Register.

Mr. PIZARCHIK. Actually, it does not. If you read the rest of that sentence, that paragraph, and put it all in context, you clearly understand that there were other factors that came into place. I admit that that first sentence was probably inartfully drafted, in light of the current——

Mr. JOHNSON. Because the truth hurts, doesn't it?

Mr. PIZARCHIK. No, actually——

Mr. JOHNSON. I will reclaim my time. Mr. Director, last year you testified and claimed that the numbers the original contractors used to arrive at the 7,000 job loss estimates were not based on any evidence, and had no basis in fact. A few short weeks later, one of the contractors testified that, in fact, the numbers that were used were based on assumptions given to them by OSM.

First, do you want to recant your earlier testimony that the numbers the contractors used were based on no evidence?

Mr. PIZARCHIK. My understanding is that——

Mr. JOHNSON. That is a yes or no question. Did you say that it was based on no evidence?

Mr. PIZARCHIK. What I said was that my understanding was that there was no basis, they could not provide the assumptions that they——

Mr. JOHNSON. But they got the numbers from OSM.

Mr. PIZARCHIK. And they used placeholder numbers in that, so——

Mr. JOHNSON. They got the numbers from OSM, Mr. Pizarchik.

Mr. PIZARCHIK. Well, we did not provide them the placeholder numbers, Mr.——

Mr. JOHNSON. And that is your testimony today, is that you did not provide them the numbers?

Mr. PIZARCHIK. My testimony is we did not provide them the placeholder numbers that they used in their calculations.

Mr. JOHNSON. OK. Then I can only assume that the numbers that OSM gave the contractors, then, were not based in fact. The problem resides with OSM, not with the contractor. That is a valid assumption.

So your testimony is that OSM and the contractors came to a mutual decision to end the contract, even though they were following OSM orders and using assumptions given to them by the OSM staff. Correct?

Mr. PIZARCHIK. [No response.]

Mr. JOHNSON. You guys set the guidelines for the rulemaking process.

Mr. PIZARCHIK. It was a collaborative effort. We hired them as the experts to provide us with a National Environmental Policy Act compliant——

Mr. JOHNSON. But OSM gave them the assumptions on the numbers, correct?

Mr. PIZARCHIK. I don't know the answer to that.

Mr. JOHNSON. You don't know.

Mr. PIZARCHIK. I don't——

Mr. JOHNSON. OK, I can accept that. Furthermore, the contractors were paid out the rest of the contract, even though they did not perform their responsibilities under the contract, at the cost of millions of dollars to taxpayers. And OSM hired another contractor

to finish the job. Shouldn't OSM have ended the contract and not paid them a penny if their work was inadequate?

Mr. PIZARCHIK. We did not pay them the entire contract amount. We paid——

Mr. JOHNSON. Why pay them anything if their work was inadequate?

Mr. PIZARCHIK. Because we paid them for the services that they provided. They did provide——

Mr. JOHNSON. How much did you pay them, again?

Mr. PIZARCHIK. Bear with me.

[Pause.]

Mr. JOHNSON. Well, we will come back to that. Finally on this subject, is it true that Morgan Worldwide is currently working on the rulemaking process, and that they were also working on the original contracting team?

Mr. PIZARCHIK. They were a subcontractor for both prime contractors, yes.

Mr. JOHNSON. That, to me, seems to undercut your logic that the original contracting team was so incompetent, if OSM has retained members of the original contracting team for the current rulemaking.

When the representatives from ECSI, a subcontractor on the original team, testified last year, they testified that OSM staff members directed the contractors to change their baseline coal production level from what the actual coal production was for 2008, and to assume that the 2008 rule had been implemented and was in effect across the United States.

I think I will come back to that question because my time has expired. I will yield back.

Mr. LAMBORN. Certainly we can ask that in the second round of questions.

Representative Tonko of New York.

Mr. TONKO. Thank you, Mr. Chair. Director Pizarchik, welcome.

Republicans are charging that OSM has recklessly rushed the stream protection rulemaking, and that it has not provided opportunity for input from outside the agency. Yet, OSM has been evaluating this issue for two years, and still has not even issued a proposed rule. Moreover, OSM received more than 32,000 comments on an advanced notice of proposed rulemaking, which the agency was under no requirement to publish, and has seen unprecedented outreach sessions with coal companies and other stakeholders.

Do you think, Mr. Director, that this process has been rushed?

Mr. PIZARCHIK. No, I do not. The previous rule they cite took five years. We are approaching about three years. And we have had more comments received on our attempt than was received in the entire 5-year process on the 2008 rule.

Mr. TONKO. So you anticipate a lot more participation yet and interest shown?

Mr. PIZARCHIK. Yes.

Mr. TONKO. And Director, isn't it true that OSM has already received more public comments, as you indicated, than in the entire 2008 stream buffer zone rulemaking?

Mr. PIZARCHIK. Yes. We have had, I believe, close to 50,000 comments input. And I believe the 2008 rule, I think, was maybe in the 28,000 range.

Mr. TONKO. And isn't it also true that OSM will again seek and consider public comments, once you issue a proposed rule?

Mr. PIZARCHIK. Yes.

Mr. TONKO. Can you tell the Committee about the outreach sessions you have held on this rule?

Mr. PIZARCHIK. There have been several of them. It started with the advance notice of proposed rulemaking that was published in November of 2009. There were, I think, about 32,000 comments received on that based on that input. We developed some concepts of changes to consider. We conducted over a dozen stakeholder outreach meetings with industry, citizens, the United Mine Workers, environmentalists, state regulators. And then we had two rounds of scoping on the draft EIS, where we received, I believe, about another 20,000 comments on the scoping sessions.

Mr. TONKO. Thank you. OSM instructed PKS not to share drafts of the proposed rule or Environmental Impact Statement with outside parties such as coal companies. The Majority has claimed this instruction violated OSM's Statement of Work rules for the contract because that document authorized contact with coal companies.

However, according to documents reviewed by the Democratic staff, the Statement of Work specifically instructed that documents could not be disseminated without written approval of the OSM contracting officer. OSM wanted the contractor to obtain information from coal companies, but not to share deliberative documents prior to the publishing of a proposed rule.

Mr. Director, isn't it true that this is standard rulemaking practice under the Administrative Procedure Act?

Mr. PIZARCHIK. That is my understanding, yes.

Mr. TONKO. And can you explain why it is done in that manner?

Mr. PIZARCHIK. I believe the process provides for the regulatory official, the agency, to be the one promulgating the regulations, not the regulated industry, and that there is a process to get public input from the regulated industry, from the environmental groups, the public, from everybody, to provide for a balanced, transparent rulemaking process, once the appropriate deliberation and thought went into the process.

And plus, under the statute that I am charged with effectuating and carrying out, I have to strike a balance between protecting the environment and the citizens while, helping meet the country's energy needs. And that is my job, that is not the industry's jobs or any other interest group.

Mr. TONKO. Thank you. Committee Republicans have charged that OSM ended its relationship with PKS before the EIS was complete, because an unfinished draft EIS chapter projected job losses from a new rule. However, Democratic staff review of internal OSM documents provided to the Committee shows that OSM had concerns about the contractor's overall performance, and that these concerns were expressed well before the job estimates were done.

What is more, state mining officials and technical experts from other Federal agencies and within OSM were all harshly critical of the contractor's work.

Did the contractor's draft job estimates have anything to do with OSM's decision to seek a separation agreement? And isn't it true that OSM civil servants expressed concerns about the contractor's performance months before the job estimates were provided?

Mr. PIZARCHIK. Yes, that is true. The numbers had nothing to do with that. And the concerns of the quality of work had been expressed by career civil servants months before the working relationship ended.

Mr. TONKO. Thank you. And then, finally, at a recent hearing the Committee Republicans said that a new stream protection rule would cost more than 100,000 mining jobs, according to Environ International Corporation. The ENVIRON study is apparently just two pages long, with the numbers that come with the National Mining Association.

Do you think this is a credible study?

Mr. PIZARCHIK. No.

Mr. TONKO. OK, could—

Mr. PIZARCHIK. In fact, if you look at the actual numbers and compare it to the facts, according to the Energy Information Agency, nationwide in 2010 there were a little under 90,000 people working directly in the coal mine. And under the environment study, they indicated nationwide the direct employment in coal mining is 135,000, a very significant difference between the facts provided by the other agency. The Energy Information Agency gets their information directly from the industry.

Mr. TONKO. So it is a huge discrepancy.

Mr. PIZARCHIK. Huge.

Mr. TONKO. Thank you.

Mr. LAMBORN. All right. Now we will recognize Representative and Dr. Benishek of Michigan.

Dr. BENISHEK. Thank you, Mr. Chairman. Thank you, Director Pizarchik, for being here today. I am Dan Benishek, I represent Michigan's first district. It is the northern part of the State, along the Great Lakes. We don't have any coal mines, but we have a lot of mining history in my district. And, more importantly, coal provides two-thirds of the energy for the State of Michigan. So we have a strong interest in the supply of coal, and the cost.

In your testimony you wrote that Congress tasked your office with striking a balance between protecting the environment and ensuring the Nation's need for coal energy. Providing energy means jobs in my district. Businesses rely on affordable power to grow, and new industry to locate there because of power constraints. There has been a lot of talk about this job situation.

How many existing American jobs does the Department of the Interior expect will be eliminated as a result of the revisions to the stream buffer zone rule?

Mr. PIZARCHIK. We are still working on the development of the revisions to our regulations, so we don't have any numbers on that—

Dr. BENISHEK. You don't expect any job loss, then?



Mr. PIZARCHIK. At this point we are still developing the regulations. We don't have our numbers completed in a finalized—

Dr. BENISHEK. So you think there will be a job increase from doing this?

Mr. PIZARCHIK. Some of it, yes. Because, for instance, if you have to transport the excess spoil to the bottom of the mountain, and to place it in a controlled fashion, as the statute prescribes, it takes more people to do that, than it does to shove it over the side of the mountain.

Dr. BENISHEK. So, how many jobs do you think are going to be created by these rules?

Mr. PIZARCHIK. At this point I can't give you a number on that, because we are still developing—

Dr. BENISHEK. So you think there is going to be a net increase in jobs from this ruling. Is that what you are telling me today?

Mr. PIZARCHIK. What I am saying is we are not fully finished with our regulations. And we have to strike that balance. There are going to be some jobs created with the concepts we have under consideration. There will be engineering jobs, there is likely to be more underground mining jobs, there is likely to be more biologist jobs and land reclamation jobs. At this point, though, it is premature to speculate what those job numbers would be.

Dr. BENISHEK. I am just finding it hard to believe that if we are going to eliminate an industry, that we are going to create more jobs in the industry in and around the country. I just find that to be a remarkable answer.

But with that, I will yield back my time.

Mr. LAMBORN. All right, thank you. Representative Flores of Texas.

Mr. FLORES. Thank you, Mr. Chairman. Thank you, Director Pizarchik, for joining us today.

With regard to the stream buffer zone rule, this issue is being written to address a specific issue in the Appalachian region. Is that correct?

Mr. PIZARCHIK. It is being addressed and written to protect streams everywhere.

Mr. FLORES. Well, in 2007, when you worked for the State of Pennsylvania, you wrote a letter to the OSM, and you objected to the scope of the stream buffer zone rule, stating that, "OSM's proposed major overhaul of its regulations, which, if adopted, will force States to make major changes to their primacy program regulations and statutes to fix a problem that doesn't exist in those states without mountaintop mining."

So, has OSM provided any documentation or any evidence suggesting that there is a nationwide problem arising from the current regulation that requires national rulemaking?

Mr. PIZARCHIK. OSM has chosen, because of the litigation, and at the request of the States, not to ask the States to amend their programs to implement the 2008 rule.

Mr. FLORES. So how many States are you talking about affecting with this rule, outside of Appalachia?

Mr. PIZARCHIK. The 2008 rule would affect all the states, all 24 primacy States. And the refinements to our existing regulations under the stream protection rule would also apply nationwide, as

the statute requires us to create a level playing field and have uniform minimum standards across the country tailored to the region-specific geography and climate. And that is what we intend to do.

Mr. FLORES. My next question is, in 2010 there was a secret settlement agreement that was signed with some environmental group, where OSM agreed to pay fees and—to propose a new stream buffer zone rule by February of 2011. Can you tell me, remind me again, I think we have talked about it in past hearings, how much were the fees that you agreed to pay?

Mr. PIZARCHIK. I don't have those numbers off the top of my head. I believe—

Mr. FLORES. Would you provide those for us? And also, when was that secret agreement signed?

Mr. PIZARCHIK. I don't know of any secret agreements. There was a settlement agreement where the litigation was placed on hold. And I believe the settlement agreement was a matter of court record on that. I don't know of any secret agreements.

Mr. FLORES. When was it signed?

Mr. PIZARCHIK. I don't recall.

Mr. FLORES. Can you provide that to—

Mr. PIZARCHIK. We can get to that. I believe we had provided you the numbers on that, but yes, we can get you both the amount of the fees, as well as the date when that document was signed.

Mr. FLORES. OK, thank you. I am going to yield back to Mr. Johnson. He has probably got some great questions he would like to ask.

Mr. JOHNSON. I thank the gentleman for yielding. Mr. Chairman, I find it interesting. I want to point out our Ranking Member, in his opening testimony, called the 2008 buffer zone rule, stream buffer zone rule that was issued by the previous Administration, a "midnight rulemaking process," yet both the Minority testimony or questions here today, as well as Mr. Pizarchik's comments, fully validated that that was a five-year process, with tens of thousands of pages of documentation and analysis that went into it. So that is a striking contrast to this current rulemaking process.

I also want to point out—and I thank my colleague, Mr. Tonko, for acknowledging that in their evaluation of the materials provided by OSM, that they determined that, indeed, there were concerns about the contractor's performance. Months, I think, was what you said just a few minutes ago, Mr. Pizarchik, months before getting to the point of terminating that contract. Yet, with all of that concern about performance, you have got members of that contracting team in the current rulemaking process, and you still maintain that the termination of that contract was simply a mutual agreement.

This Kabuki dance that OSM is doing, tap-dancing around this issue, is not going unnoticed by the American people. And I don't know who you think your Department is fooling, but I am not one of them.

So, with that, Mr. Chairman, I am going to yield back, and I will come back for the second round of questions. I thank the gentleman for yielding.

Mr. LAMBORN. OK, thank you. Representative Thompson of Pennsylvania.

Mr. THOMPSON. Thank you, Chairman. Thank you, Director, for being here today. It is good to see you. I apologize for being late. I was actually on the House Floor, talking about the cost of energy. So it was work-related tardiness.

Director Pizarchik, the rule is being promulgated to address an issue specific to streams in the Appalachian region, which I know you are very familiar with. Yet the rule will affect every mine throughout the country.

In 2007, when you worked for the Commonwealth of Pennsylvania, you signed a letter to OSM objecting to the scope of the stream buffer zone rule, saying—and a quote from your letter—“OSM’s proposed major overhaul of its regulation, which, if adopted, will force States to make major changes to their primacy program regulations and statutes to fix a problem that does not occur in those states without mountaintop mining.”

So, my first question for you, has OSM provided any documentation or evidence suggesting a nationwide problem arising from the current regulation that requires a national rulemaking?

Mr. PIZARCHIK. The 2008 rule dealt with the burying of streams with excess spoil, and that was occurring primarily in Central Appalachia, and States like Pennsylvania did not allow its streams to be buried with excess spoil, did not allow its streams to be mined through. So there really wasn’t a need for that change in Pennsylvania and other states who were not burying streams with excess spoil.

Regarding the revisions to the regulations that we are working on to refine our existing regulations to more completely implement the statute, there will be information in the draft EIS, as well as in the preamble, that explains the need and the purpose for that rulemaking, to better protect streams to more completely implement the statute.

Mr. THOMPSON. Now, you recently notified industry of your intentions to revise regulations related to fees that OSM charges for the review, Administration, and enforcement of mining permits in Federal program states and on Indian lands.

Now, what is OSM’s current costs for administering the programs in the two Federal program States, Tennessee and Washington, and on Indian lands for which you will be seeking reimbursement? And what does this amount to on a per-ton-of-coal-mine basis?

Mr. PIZARCHIK. I can’t give you that cost here today, I don’t know what those costs are. Our projections in the budget is that we want to recover about \$3.4 million on an annual basis for the services that we provide. And that, I believe, is a significant portion of the cost. The statute puts an upper limit on the cost. We cannot charge more than our actual cost, so we are working to recover more of those to reduce the spending and the Federal deficit.

And on a per-ton basis, I haven’t done that analysis, I can’t provide you an answer to that.

Mr. THOMPSON. OK. A recent ENVIRON study found that more than 220,003 jobs in the Appalachian region alone are at risk of going away. How many existing Pennsylvania jobs does the Department of the Interior expect will be eliminated as a result of revisions to the stream buffer zone rule? Has that analysis been done?

Mr. PIZARCHIK. We don't have a rule proposed yet. And until we have a rule that is published, that is when the analysis will come out, as to what the potential impacts of that rule could have on jobs.

Mr. THOMPSON. Well, in development of the rule, what consideration will be given to the economic impacts for those communities, and specifically jobs that may be put at risk, as a result of the rule-making that will be promulgated?

Mr. PIZARCHIK. We will be examining both the cost and the benefits of the proposed rule, once we get to the point we have a proposed rule. As I understand the requirement, the benefits of the rule protecting the environment, the streams, the public, the people living where the coal is mining has to outweigh the cost of the rule.

Mr. THOMPSON. How is that measured? I mean that sounds good, but I have seen so many rules come out of this Administration, and not just your agency, but different agencies where, in the end, I mean, it is sort of like, you know, they say you can manipulate statistics any way you want, just whatever kind of argument—that is what I found in my life.

And so, I really look forward to seeing that analysis. And hopefully it just—it provides just significant clarity of what the risks and the benefits are, the costs and the benefits. So—

Mr. PIZARCHIK. And that is what we are trying to accomplish. And we believe—our goal is to have something much more detailed, so that people and so Congress can look at the analysis, understand the basis for the numbers and the analysis, and how they were derived, so that everybody can provide an informed assessment, and provide us their informed comments.

Mr. LAMBORN. OK, thank you. And for the second round I will recognize myself.

Mr. Pizarchik, when proposing this budget, you are calling for higher fees for the State programs to be offset with user fees for services provided to the coal industry. Those are the higher fees that you would propose.

Have you analyzed what higher fees would do to the supply and the production of coal?

Mr. PIZARCHIK. I personally have not. No, sir.

Mr. LAMBORN. Do you believe that higher fees will affect the production of coal?

Mr. PIZARCHIK. It depends on the area and the cost competitiveness of the area. I think some parts of the country, where the coal is economical to mine, I doubt that it will have much of an effect, if anything, or it will be inconsequential, in the context of it.

In regards to the amount of fees, you know, considering that there is over a billion tons of coal mined annually, I would expect that it would not have a major impact on the coal being produced, nationwide.

Mr. LAMBORN. But if you think that in some areas it would not have a measurable impact, you are implying that in other areas it would.

Mr. PIZARCHIK. No, I don't want to make that implication at all. I think there may be more of an impact, but I don't believe it would be a major impact. Because again, if you look at the amount of fees that we are talking about here, which currently is coming from the

average taxpayer through general revenues appropriated to provide these services—pay for these services that are provided to the industry, it seems to me that it is only fair that the people who get the benefit of these government services ought to pay a larger share of those.

Mr. LAMBORN. That may or may not be, but the impact of higher fees will affect production. Or, if not, it will be passed on to the consumer, won't it?

Mr. PIZARCHIK. Again, it depends on the magnitude of the fees. As I understand the basic economics of this, due to the large scale of production and the minimal amount of these fees in regards to the overall cost of production, I doubt that they would have a significant impact or—on costs—

Mr. LAMBORN. So, if I get this right, you are saying you don't think higher fees will affect the supply and the production of coal, and you don't think that it will be passed on to and affect the cost of energy to the ultimate consumer?

Mr. PIZARCHIK. It—

Mr. LAMBORN. I find that curious. Let me change subjects in my last few minutes here. And you have stated more than once today before this Committee that companies just push the overburden off the side of the hill and off the side of the mountain. But under current law and regulation since SMCRA has been enacted, doesn't the placement of material have to be considered in a mine plan?

And so, if people are reviewing and enforcing the mine plans, this should not be happening, unless someone is not doing their job. Wouldn't that be correct?

Mr. PIZARCHIK. That would be a logical assumption.

Mr. LAMBORN. All right, thank you. I would now like to recognize Representative Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. I would like to pick up where I left off before, Mr. Director. When the representatives from ECSI, a subcontractor on the original team, testified last year, they testified that OSM staff members directed the contractors to change their baseline coal production level from what the actual coal production was for 2008, and to assume that the 2008 rule had been implemented, and was in effect across the United States. The contractors testified they were asked to do this because, contrary to your testimony from last year, the 2008 rule was not a rollback, but would have actually caused coal production in the United States to drop. This would have made the 7,000 job loss number look even smaller.

Did you or anyone on staff at OSM direct the contractors and the subcontractors to change their baseline assumption?

Mr. PIZARCHIK. I did not direct them, and I don't—I am not aware of anybody on the staff directing to do that.

My understanding on the baseline assumptions they were using, they used a 2008 rule, it appeared in chapter 1 and 2 in the fall of 2009. But the numbers that they used to come up with the 7,000 that you are referring to did not use the 2008 rule as the baseline. Instead, it wanted to take it back—

Mr. JOHNSON. So you were not aware of any direction from you or your Department requiring the contractors to change their assumption?

Mr. PIZARCHIK. I don't recall—

Mr. JOHNSON. OK, thank you. Would you like to recant your testimony that the 2008 rule was a rollback of the original stream buffer zone rule? Because that is what you told us last fall.

Mr. PIZARCHIK. I am—have to get that in context. I don't recall that statement.

Mr. JOHNSON. OK, all right. As a result of the settlement OSM entered into, the 2008 rule was never implemented in States with primacy. Without any implementation in the vast majority of impacted territory, it seems that there is no way for OSM to justify the need for this regulation, when there is no evidence that the existing regulations are inadequate.

Since the decision to change the rule occurred prior to January 20, 2009, and we have seen that in the Register, there was never an opportunity for any actual analysis on the alleged inadequacies of the 2008 rule. Correct? I mean if it wasn't implemented, you had no basis upon which to do a valid analysis.

Mr. PIZARCHIK. It is being implemented in Tennessee.

Mr. JOHNSON. That is one place. This is a big country. So it hasn't been fully implemented, right?

Mr. PIZARCHIK. That is correct.

Mr. JOHNSON. OK. It has not been fully implemented. There has been no science, scientific analysis, on the implementation of the 2008 rule, because it was never implemented. Correct? Has your Department done any scientific analysis on the 2008 rule?

Mr. PIZARCHIK. I am not familiar with all the scientific analysis—

Mr. JOHNSON. You direct the Department, Mr. Pizarchik. Has your Department conducted any scientific analysis? You are talking about setting aside a five-year in-the-making rule. And you don't know whether your Department has conducted analysis of that rule before going and spending millions of taxpayer dollars to rewrite it?

Mr. PIZARCHIK. We know that the practices that that rule provides in place have a deleterious effect on the environment—

Mr. JOHNSON. So have you conducted any scientific analysis on that rule?

Mr. PIZARCHIK. There have been scientific—

Mr. JOHNSON. Well, you just said no just a minute ago. And so now you are saying that there is. What is the answer? Has there been scientific analysis on the 2008 rule?

Mr. PIZARCHIK. There has been scientific analysis on the practices that are codified in the 2008 rule.

Mr. JOHNSON. How could it be so, because it hasn't been implemented?

Mr. PIZARCHIK. Because a number of those practices that the 2008 codifies were being done under a guidance policy before. Now there is a regulation. So it is, in essence, codifying a practice that was inconsistent with a statute that has been going on for years, as I believe Chairman Lamborn had mentioned earlier, that many of these practices go back—and it seems to be, if you look at it from a logical standpoint, is inconsistent with the statutory requirements.

Mr. JOHNSON. OK. I am not sure I understood what you just said. Maybe some of my colleagues can explain it to me later. But

I don't know how you can do scientific analysis on a rule that hasn't yet been implemented.

Yes, and the guidance, the guidance policy, was shot down by the court. So I am not sure I understand, but let's move on.

Two weeks ago I asked Secretary Salazar if threatening extreme consequences for following an agreed-upon Statement of Work was something that is a normal practice at the Department of the Interior. As you well know, I was referring to the threat of extreme consequences that you made through an OSM employee to the contracting team.

First, will you confirm that you made that statement?

Mr. PIZARCHIK. I don't believe I made that—

Mr. JOHNSON. All right. Well, let's see a chart here. We have got a slide. Maybe I can refresh your memory. Take a look at the pink section of that slide there, Mr. Pizarchik.

Mr. PIZARCHIK. I am sorry, but I can't read it from here.

Mr. JOHNSON. OK. I will read it for you.

Mr. LAMBORN. Representative Johnson, while he looks at that maybe someone could yield time to you in a—

Mr. JOHNSON. Go ahead.

Mr. LAMBORN. At the—before the—

Mr. JOHNSON. I yield back.

Mr. LAMBORN [continuing]. Finish of this round. OK, thank you. Representative Tonko of New York.

Mr. TONKO. Thank you, Mr. Chair. One of the witnesses, Mr. Director, on our second panel is expressing strong objections to the Administration's proposal to terminate the Abandoned Mine Land emergency fund in the Fiscal Year 2013 budget. Why is the Administration eliminating this funding stream?

Mr. PIZARCHIK. Are you referring to the—

Mr. TONKO. The AML emergency fund.

Mr. PIZARCHIK. Well, actually, the AML emergency Federal—OSM emergency program was eliminated in 2012 and it is not included in the 2013. The 2013 proposes to change how the AML funds are distributed from the certified States, to eliminate funding to them.

Mr. TONKO. Well, the Administration, then, is proposing to move AML reclamation—the reclamation program to a competitive grant process?

Mr. PIZARCHIK. Yes, yes. That is not the emergency, that—well, I guess it would be the emergency—yes. The Administration has proposed to do that, in order to provide for the most dangerous sites to be reclaimed.

Mr. TONKO. OK. Now, did the Administration consider other possible allocation mechanisms for focusing these funds on high-priority sites?

Mr. PIZARCHIK. As I understand it, they were basing it on the experience and practice that they had with BLM, and we are looking at the competitive process as being the best one suited for that. I don't know if other processes were considered.

Mr. TONKO. And in your view, is there any risk that this new process would slow the pace of reclamation?

Mr. PIZARCHIK. In my view, if it is implemented the way I think it should be, it should not, because it would be based on the work

that the States have already begun, because it usually takes several years from the time they want to do a project to complete it. And the most efficient way to do that is to use, as the basis, this work that the States have already completed, the emergency projects that they are working on, and they are already working on the most dangerous sites.

So now, by using that work, we could find out which is the most dangerous of all the State ones and get those done first.

Mr. TONKO. Thank you. I yield back, Mr. Chair.

Mr. LAMBORN. All right, thank you. Representative Benishek?

Dr. BENISHEK. Well, I was enjoying Mr. Johnson's testimony there, and I would like to yield my time to him.

Mr. JOHNSON. I thank the gentleman for yielding.

Mr. Pizarchik, I gave you a copy of a document there. Would you please read the part that is highlighted that page?

Mr. PIZARCHIK. Yes. It is John Craynon, Wednesday, December 15, 2010, at 3:17 p.m. And there is another part that is highlighted. It says, "As per my meeting with OSM Director Joe Pizarchik, no part of the SPR rule text or the EIS are to be sent to any parties for the purposes of the EIS preparation at any time. He indicated that this direction is non-negotiable, and that violations would have extreme consequences."

Mr. JOHNSON. What exactly did you mean when you threatened "extreme consequences"?

Mr. PIZARCHIK. I did not threaten extreme consequences. I——

Mr. JOHNSON. That is what this email says.

Mr. PIZARCHIK. Yes, and I——

Mr. JOHNSON. One of your employees testified to this.

Mr. PIZARCHIK [continuing]. Copied on that email, and I just——

Mr. JOHNSON. Hold on. Either your employee has lied, or you said this. So which is it?

Mr. PIZARCHIK. I don't believe it is either of those, sir. I believe the employee——

Mr. JOHNSON. Wait a minute, Mr. Pizarchik. We are looking at a piece of paper from your Department in an email from one of your employees where you threatened extreme consequences. And you are saying that is not true?

First you ask us to believe what we can't see. I mean what we can't hear. Now you are asking us to believe what we see—or disbelieve what we see.

Mr. PIZARCHIK. Well, as I said, I didn't write that email. I don't believe I ever made that——

Mr. JOHNSON. OK.

Mr. PIZARCHIK. I am certainly experiencing the severe consequences.

Mr. JOHNSON. Is it safe to say that the extreme consequences that you were referring to would be to fire the contractors and to pay them the full price at the cost of millions of taxpayer dollars?

Mr. PIZARCHIK. No.

Mr. JOHNSON. OK, thank you. Mr. Chairman, I want to get to one other question.

Earlier, when the Ranking Member of the Full Committee was questioning you, he asked you questions about how the legislation that was passed by the Committee last week would affect your abil-



ity to release and issue regulations. And you said that it would adversely affect your ability to issue regulations as they related to—and I think one of the areas was something to do with ash. Would you restate that?

Mr. PIZARCHIK. I am sorry, I—

Mr. JOHNSON. He was talking about H.R. 3409, and the fact that you maintain that it would impede your ability to issue any regulation. And you gave several examples, and one of those had to do with ash, or placement of ash, or something like that.

Mr. PIZARCHIK. Right.

Mr. JOHNSON. OK. Restate that, please.

Mr. PIZARCHIK. I am not understanding—

Mr. JOHNSON. OK. Then let's go back. How would H.R. 3409 impede your ability to implement any regulation?

Mr. PIZARCHIK. As I understand it, from how it has been portrayed, is that that bill would prohibit us from doing any regulations that could impact coal jobs, that could impact lands' unsuitable designation, like a petition we have in Tennessee right now, and that would have any adverse impact on, as I understood it, coal being available. And if we are not able to proceed with regulations in this particular area, it could have an impact on how the ash is used on the site that could adversely affect the economics of—

Mr. JOHNSON. OK. How ash is used on site. OK? How would "how ash is used on site" adversely impact employment in coal mines? Because you said just a few minutes ago that it was going to increase jobs, because it would take more people to do that work. Right? If you had to—

Mr. PIZARCHIK. No, I didn't say that at all.

Mr. JOHNSON. OK. Explain to me, then.

Mr. PIZARCHIK. Well, as I understand it, in some instances, instead of disposing of ash at a landfill, the ash can be beneficially used on the mine site, and that they pay an operator to take the ash to use it on the mine site. If the operator is not able to be paid to use the ash on its mine site, that could affect their economics of that particular mine.

Similarly, if the operator cannot sell its coal to a power plant because the power plant requires the ash to go back to the coal company, and the coal company has no place to place the ash, they would not have a market for their coal. They don't have a market for their coal, they don't have jobs for their employees.

Mr. JOHNSON. Mr. Chairman, I am going to summarize, I think. You know, I want to commend you and the chairman of the Full Committee, Mr. Hastings, for digging deep for the answers to this important issue, and the questions we are asking.

We are clearly not getting direct or timely answers from OSM. And Director Pizarchik's testimony today only confirms that we need to keep digging deeper.

As I said before, where there is smoke there is fire. And there is a ton of smoke coming from this rulemaking process. In another bow by this President to extreme environmentalists, OSM has undertaken this massive rewrite of the stream buffer zone rule that could cost hundreds of thousands direct and indirect jobs in the

coal industry as we know it, and stop any economic recovery in its tracks with skyrocketing electricity prices.

Until we get all of the answers from OSM on this rulemaking process, it would seem to me to be irresponsible for the Administration to go forward with the rule. However, it is clear that the President is only interested in this year's reelection this November, and is not worried about protecting the jobs of hardworking men and women that go to work every day in the coal industry and the many related industries. That is why my legislation is so important, because it would simply stop the President from going forward with a new stream buffer zone rule until the end of 2013.

And as you know, my legislation received bipartisan support in Committee, and I expect it will receive bipartisan support once it comes to the full House for consideration later this year.

Thank you again, Mr. Chairman. And with that, I yield back the balance of my time.

Mr. LAMBORN. OK, thank you. Mr. Amodei of Nevada.

Mr. AMODEI. Thank you, Mr. Chairman. Mr. Director, I am a new guy here, so I am sure you aren't intimately familiar with me. But I come from this place where we do a little bit of minerals extraction and the hardrock process in Nevada.

And so, my questions are going to be just focused on the proposed merger. Can you tell me what your knowledge is of the reclamation programs of the Nevada Division of Environmental Protection, as they presently exist?

Mr. PIZARCHIK. I am not familiar with that at all, sir.

Mr. AMODEI. OK, I appreciate that. So when we talk about merger with BLM and OSM, obviously BLM is a major Federal land manager in the State of Nevada. They have been involved in permitting and things like that in partnership with the State Division of Environmental Protection out there. And some of us happen to think that they are doing a pretty good job regarding reclamation and surety requirements and all those things associated with surface mining in the State of Nevada.

So, when I hear about the merger of your entity with BLM for purposes of that in a State that I happen to think is doing a pretty good job of evolving through the years, making environmentally responsible decisions and policies about reclamation and sureties and things to make sure that happens, I am just wondering if there is anything on your radar screen in the context of the proposed merger that indicates there is a problem in Nevada with reclamation of surface operations there that the merger would—puts you in a unique—your organization in a unique opportunity to address.

Mr. PIZARCHIK. Congressman Amodei, I am not aware of that. My understanding of the proposal to consolidate OSM and BLM was for efficiencies, and to try to get a different way to lower the cost of government, to be more efficient. But I am not personally aware of any issues in Nevada on how the—

Mr. AMODEI. OK.

Mr. PIZARCHIK [continuing]. Program is implemented by BLM.

Mr. AMODEI. Thank you very much. Appreciate that. Yield back, Mr. Chairman.

Mr. LAMBORN. All right, thank you. And finally, unless someone else shows up, Representative Thompson.

Mr. THOMPSON. Thank you, Chairman. Director Pizarchik, in your testimony you suggested as the U.S. continues to reduce our reliance on foreign oil, coal will continue to play an important role in meeting our domestic demand. Now, there was a stark contrast to that. As a result of the President's policies, we had a terrible announcement last week about a coal-fired power plant that has been producing affordable and reliable energy for many years—and, frankly, some really good jobs, direct and indirect jobs—plans for that plant to close under the crushing pressure of the regulations and the bureaucracy that have been layered on it by this Administration.

But that said, I appreciate your testimony, where you acknowledge that. I know you have been involved in the coal industry throughout your life and that your observation will continue to play a role in meeting our domestic demand. With that in mind, does the Obama Administration support coal-to-liquid technology and facilities, or clean coal technology, or—

Mr. PIZARCHIK. I believe that the Obama Administration has put more money into clean coal technology than any previous Administration. In fact, I believe we—the Obama Administration—has put more money in the clean coal technology than any country in the world has. I think it was in the neighborhood of \$3.5 billion that has been put into clean coal technology. And you don't make that kind of an investment into coal if you have the belief that coal won't be around.

I don't know all the ins and outs of it. I am not a clean coal engineer, or expert in that, but I do understand that there has been more money put into clean coal technology by the Obama Administration than anybody else.

Mr. THOMPSON. Yes. Well, unfortunately, that announcement last week, and that was not the only one that was announced, that was the one that obviously struck home for me, in my congressional district. It is not having an impact of moving us, I think, away from what is a very affordable and reliable energy, in terms of coal.

In your discussion of the AML reclamation program reform proposals, you talked about eliminating the unrestricted payments to certify States and Tribes that have completed reclamation. Have you performed any kind of analysis on how this change might impact the overall reclamation efforts? I mean obviously we have lots of abandoned mine lands yet to be addressed.

Mr. PIZARCHIK. We have looked into that a bit. Most of that certified money is coming out of the general treasury, so it would not be a reduction in money that was being used for abandoned mine lands. And for example, some of the certified states who have been receiving funds in—let's take Wyoming. They have received, I believe, over \$322 million that they haven't spent on anything yet, as I understand it, and another \$150 million from last year.

So, I don't know how they plan to use it. The law gives them a great deal of flexibility to use it. But from that standpoint, it is clear that some of this money is just accumulating, it is not being utilized by the certified States.

Now, in regards to some of the other ones, I know in Montana there has been an interest to be able to use the certified money and some other monies for reclamation of abandoned hardrock mines,

and to have limited liability protection. And the Secretary had just informed Senator Tester, I believe last week, that we are going to go forward with a rulemaking to modify our regulations so that the State of Montana and others who have AML monies, that they could use that for the reclamation of the abandoned hardrock mines.

But we still think that the best approach is not to take money from the coal industry to use to reclaim hardrock mines, but to create a comprehensive program for the reclamation of abandoned hardrock mines, to provide an adequate and sustained funding level from the hardrock mining industry to deal with those thousands of abandoned underground mines, and the polluted water, and the pollution from all of those abandoned hardrock mines.

Mr. THOMPSON. The monies that we are talking about weren't part of the 2006 amendments to SMCRA. Frankly, it is the States' and the Tribes' money that we are talking about? I mean the 2006 amendments to SMCRA, didn't it clearly designate that?

Mr. PIZARCHIK. As I understand what precipitated the 2006 amendments was the collection of the AML monies, and the money not being appropriated under the old formula to the States and Tribes. And as part of the compromise in 2006—again, it is just my understanding of it—was that in lieu of getting that money that had not been appropriated to those States, certified States and Tribes, that that money was going to be used by other States who still had abandoned coal problems to reclaim. And to offset that, there would be appropriations, or money coming out of the general treasury, to go to those certified States and Tribes.

It is a matter of perspective. Some of those folks believe it was their money. Some other folks, it wasn't. And I think you could reach either answer, depending on where you stand and look at the issue. It was a compromise, as I understand it, in order to allow for the reauthorization, and to address the money that hadn't been appropriated.

That was also what led to the mandatory distribution so that the money that had accumulated would not be sitting in Washington, but would be actually dispensed to the States to use for what it was intended. And that has carried over, and that mandatory provision provides for non-discretion on our part. Every year we distribute what we collect out to the States, pursuant to the new formula.

Mr. THOMPSON. Well, I appreciate your explanation. But, I mean, I can see where there is confusion and controversy, just given your explanation of what was supposed to be funded, what wasn't funded, who—what money was taken from where.

Mr. PIZARCHIK. It is very complex.

Mr. THOMPSON. Well, thank you, Mr. Chairman.

Mr. LAMBORN. OK, thank you. I want to thank the Director for being here. These are serious issues. We appreciate your time before the Subcommittee.

Members of the Subcommittee may have additional questions for the record, and I would ask that you respond to those in writing. Thank you for being here.

Mr. PIZARCHIK. You are welcome. And thank you for inviting me. I appreciate your interest in OSM and our budget and rulemaking.

You have certainly heightened the public awareness of our work. I appreciate that.

Mr. LAMBORN. You are welcome. Thank you.

OK, I would now like to ask unanimous consent to submit for the record a report by ENVIRON on the impacts of the proposed stream buffer zone rulemaking into the record of today's hearing.

[No response.]

Mr. LAMBORN. Hearing no objection, so ordered.

[The ENVIRON report submitted for the record by Mr. Lamborn has been retained in the Committee's official files.]

Mr. LAMBORN. And now I would like to invite our second panel to come forward. It consists of Ms. Madeline Roanhorse, President of the National Association of Abandoned Mine Land Programs; Mr. Gregory Conrad, Executive Director of the Interstate Mining Compact Commission; and Mr. Matt Wasson, Director of Programs for Appalachian Voices.

Your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to five minutes, as outlined in our invitation letter to you, and under Committee Rule 4(a). Our microphones are not automatic, so you need to turn them on when you are ready to begin.

And here is how our timing lights work. When you begin to speak, a timer and a green light will come on. After four minutes, a yellow light will appear. And at that time you should conclude your statement, begin to conclude your statement. And at five minutes the red light comes on.

And I will be giving the gavel momentarily to Representative Johnson, but we will begin the testimony. Thank you all for being here.

And, Ms. Roanhorse, you may begin.

**STATEMENT OF MADELINE ROANHORSE, PRESIDENT,  
NATIONAL ASSOCIATION OF ABANDONED MINE LAND  
PROGRAMS**

Ms. ROANHORSE. My name is Madeline Roanhorse. I am the manager of the AML reclamation/UMTRA Department for the Navajo Nation. I am appearing here today on behalf of the National Association of Abandoned Mine Lands Program [sic], referred to as AML Association.

AML Association represents 30 States and Tribes Federally approved abandoned mine lands program authorized under the Surface Mining Control and Reclamation Act. Based on the SMCRA fee collections, the Fiscal Year 2013 mandatory appropriation for State and Tribal AML grants should be \$480 million. Instead, OSM has only budgeted \$307 million, a reduction of \$180 million. This reduction would primarily be accomplished by eliminating funding for those States and Tribes that have successfully certified completion of their highest-priority coal reclamation sites.

From the beginning of SMCRA in 1977 to the latest—to 2006, Congress promised that at least half of the money generated from the fees collected within the boundaries of a State or Tribe—referred to as State or Tribal share—would be returned for use as described in the Act.

For certified States and Tribes, the Tribes' share funds can be used for environmental stewardship. Cleaning up abandoned coal and hardrock mines, sustainable development, infrastructure improvements, alternative energy projects all stimulate economic activity, protecting public health and safety, creating green jobs, and improving the environment.

Each of these specific goals have been embraced by the Administration. Breaking the promise of the State and Tribal share funding will upset 10 years on negotiation that resulted in the balanced compromise achieved in the 2006 amendments to SMCRA. We, therefore, respectfully request the Committee to continue funding for certified States and Tribes at the statutory authorized level, and turn back any efforts to amend SMCRA in this regard.

The proposed budget would also provide no funding for the Federal AML emergency program. Section 410 of SMCRA was unchanged by the 2006 amendments. It requires OSM to fund the emergency AML program.

Additionally, the Act does not allow States and Tribes to fund an emergency program from their own AML grants. On the contrary, it requires strict compliance with non-emergency funding priorities. If Congress allows the elimination of the emergency program, States and Tribes will have to set aside large portions of their non-emergency AML grant funds to be prepared for future emergencies. This will result in the funds being diverted from other high-priority projects. It will also present special challenges for program States, since they have to have to save multiple years of funding in order to address a single emergency, thereby delaying work on other projects. For these reasons and many others, we urge the Committee to restore funding for the AML emergency program in 2013.

Finally, we oppose OSM's proposal to drastically remove the distribution process for AML funds to non-certified States through a competitive grant program. This proposal will completely undermine the balance of interest, and objectives achieved by the 2006 amendments. Among other things, the proposal will cede authority for both emergency and non-emergency funding decisions to an advisory council.

Aside from time delays associated with this approach, it leaves many unanswered questions regarding the continued ability of State and Tribal AML programs where they do not win in the bidding process. It also upsets the predictability of AML funding for long-term project planning. We urge the Subcommittee to reject this unjustified proposal. Delete it from the budget. Restore the full mandatory funding amount of \$480 million.

A resolution to this effect adopted by the Association is attached to my testimony, as is a comprehensive list of questions regarding the legislative proposal. I respectfully request that they include in the record of this hearing.

Thank you for the opportunity to present our views this morning. I would be happy to answer any questions that you may have. Thank you.

[The prepared statement of Ms. Roanhorse follows:]

**Statement of Madeline Roanhorse, Manager, AML Reclamation/UMTRA Department, Navajo Nation, on Behalf of the National Association of Abandoned Mine Land Programs**

My name is Madeline Roanhorse and I serve as the Manager of the AML Reclamation/UMTRA Department with the Navajo Nation. I am appearing today on behalf of the National Association of Abandoned Mine Land Programs (NAAMLPLP). The NAAMLPLP represents 30 states and tribes with federally approved abandoned mine land reclamation (AML) programs authorized under Title IV of the Surface Mining Control and Reclamation Act (SMCRA). My testimony today will focus primarily on the Title IV AML program under SMCRA.

Title IV of SMCRA was amended in 2006 and significantly changed how state and tribal AML grants are funded. These grants are still based on receipts from a fee on coal production, but beginning in FY 2008, the grants are funded primarily by mandatory appropriations. As a result, the states and tribes should receive \$488 million in FY 2013. In its FY 2013 budget, OSM is requesting \$307 million for state and tribal AML grants, a reduction of \$180 million. OSM's budget also includes a legislative proposal for the establishment of a competitive grant process that would allegedly improve AML program efficiency. The legislative proposal would also eliminate funding to states and tribes that have "certified" completion of their highest priority coal reclamation sites. I appreciate the opportunity to testify before the Subcommittee and outline some of the reasons why NAAMLPLP adamantly opposes OSM's proposed FY 2013 budget.

Over the past 30 years, the accomplishments of the states and tribes under the AML program has resulted in tens of thousands of acres of abandoned mine lands having been reclaimed, thousands of mine openings having been closed, and safeguards for people, property and the environment having been put in place. Be assured that states and tribes continue to be committed to address the unabated hazards at both coal and non-coal abandoned mines. We are all united to play an important role in achieving the goals and objectives as set forth by Congress when SMCRA was first enacted—including protecting public health and safety, enhancing the environment, providing employment, and adding to the economies of communities impacted by past coal and noncoal mining.

SMCRA was passed in 1977 and set national regulatory and reclamation standards for coal mining. The Act also established a Reclamation Fund to work towards eliminating the innumerable health, safety and environmental problems that exist throughout the Nation from the mines that were abandoned prior to the Act. The Fund generates revenue through a fee on current coal production. This fee is collected by OSM and distributed to states and tribes that have federally approved regulatory and AML programs. The promise Congress made in 1977, and with every subsequent amendment to the Act, was that, at a minimum, half the money generated from fees collected by OSM on coal mined within the boundaries of a state or tribe, referred to as "State Share", would be returned for the uses described in Title IV of the Act if the state or tribe assumed responsibility for regulating active coal mining operations pursuant to Title V of SMCRA. The 2006 Amendments clarified the scope of what the State Share funds could be used for and reaffirmed the promise made by Congress in 1977.

If a state or tribe was successful in completing reclamation of abandoned coal mines and was able to "certify" under Section 411 of SMCRA, then the State Share funds could be used to address a myriad of other abandoned mine issues as defined under each state's or tribe's approved Abandoned Mine Reclamation Plan. These Abandoned Mine Reclamation Plans are approved by the Office of Surface Mining and they ensure that the work is in accordance with the intent of SMCRA. Like all abandoned mine reclamation, the work of certified states and tribes eliminates health and safety problems, cleans up the environment, and creates jobs in rural areas impacted by mining.

The elimination of funding for certified state and tribal AML grants not only breaks the promise of State and Tribal Share funding, but upsets the balance and compromise that was achieved in the comprehensive restructuring of SMCRA accomplished by the 2006 Amendments following more than ten years of discussion and negotiation by all affected parties. The funding reduction is inconsistent with the Administration's stated goals regarding jobs and environmental protection. We therefore respectfully ask the Subcommittee to support continued funding for certified states and tribes at the statutorily authorized levels, and turn back any efforts to amend SMCRA in this regard.

In addition to the \$180 million reduction for certified states and tribes, the proposed FY 2013 budget perpetuates the termination of federal funding for the AML emergency program, leaving the states and tribes to rely on funds received through

their non-emergency AML grant funds. This contradicts the 2006 amendments, which require the states and tribes to maintain “strict compliance” with the non-emergency funding priorities described in Section 403(a), while leaving Section 410, Emergency Powers, unchanged. Section 410 of SMCRA requires OSM to fund the emergency AML program using OSM’s “discretionary share” under Section (402)(g)(3)(B), which is entirely separate from state and tribal non-emergency AML grant funding under Sections (402)(g)(1), (g)(2), and (g)(5). SMCRA does not allow states and tribes to administer or fund an AML emergency program from their non-emergency AML grants, although, since 1989, fifteen states have agreed to implement the emergency program *on behalf of OSM contingent upon OSM providing full funding* for the work. As a result, OSM has been able to fulfill their mandated obligation more cost effectively and efficiently.

Regardless of whether a state/tribe or OSM operates the emergency program, only OSM has the authority to “declare” the emergency and clear the way for the expedited procedures to be implemented. In FY 2011, OSM issued guidance to the states that the agency “will no longer declare emergencies.” OSM provided no legal or statutory support for its position. Instead, OSM has “transitioned” responsibility for emergencies to the states and tribes with the expectation that they will utilize non-emergency AML funding to address them. OSM will simply “assist the states and tribes with the projects, as needed”. Of course, given that OSM has proposed to eliminate all funding for certified states and tribes, it begs the question of how and to what extent OSM will continue to assist these states and tribes.

If Congress continues to allow the elimination of emergency program funding, states and tribes will have to adjust to their new role by setting aside a large portion of their non-emergency AML funds so that they can be prepared for any emergency that may arise. Emergency projects come in all shapes and sizes, vary in number from year to year and range in cost from thousands of dollars to millions of dollars. Requiring states and tribes to fund emergencies will result in funds being diverted from other high priority projects and delay certification under Section 411, thereby increasing the backlog of projects on the Abandoned Mine Land Inventory System (AMLIS). For minimum program states and states with small AML programs, large emergency projects will require the states to redirect all or most of their AML resources to address the emergency, thereby delaying other high-priority reclamation. With the loss of stable emergency program funding, minimum program states will have a difficult, if not impossible, time planning, budgeting, and prosecuting the abatement of their high priority AML problems. In a worst-case scenario, a minimum program state would not be able to address a costly emergency in a timely fashion, and would have to “save up” multiple years of funding before even initiating the work to abate the emergency, in the meantime ignoring all other high priority work.

OSM’s proposed budget suggests addressing emergencies, and all other projects, as part of a competitive grant process whereby states and tribes compete for funding based on the findings of the proposed AML Advisory Council. OSM believes that a competitive grant process would concentrate funds on the highest priority projects. While a competitive grant process may seem to make sense at first blush, further reflection reveals that the entire premise is faulty and can only undermine and upend the deliberate funding mechanism established by Congress in the 2006 Amendments. Since the inception of SMCRA, high priority problems have always taken precedence over other projects. The focus on high priorities was further clarified in the 2006 Amendments by removing the lower priority problems from the Act and requiring “strict compliance” with high priority funding requirements. OSM already approves projects as meeting the definition of high priority under its current review process and therefore an AML Advisory Council would only add redundancy and bureaucracy instead of improving efficiency.

Based on our understanding of OSM’s legislative proposal, there are a myriad of potential problems and implications for the entire AML program. They include the following:

- Has anyone alleged or confirmed that the states/tribes are NOT already addressing the highest priority sites? Where have the 2006 Amendments faltered in terms of high priority sites being addressed as envisioned by Congress? What would remain unchanged in the 2006 Amendments under OSM’s proposal?
- If the current AML funding formula is scrapped, what amount will be paid out to the non-certified AML states and tribes over the remainder of the program? What does OSM mean by the term “remaining funds” in its proposal? Is it only the AML fees yet to be collected? What happens to the historic share balances in the Fund, including those that were supposed to be redirected to the Fund based on an equivalent amount of funding being paid to



certified states and tribes each year? Would the “remaining funds” include the unappropriated/prior balance amounts that have not yet been paid out over the seven-year installment period?

- Will this new competitive grant process introduce an additional level of bureaucracy and result in more funds being spent formulating proposals and less on actual AML reclamation? The present funding formula allows states and tribes to undertake long-term strategic planning and efficiently use available funds.
- How long will OSM fund a state’s/tribe’s administrative costs if it does not successfully compete for a construction grant, even though the state/tribe has eligible high priority projects? How will OSM calculate administrative grant funding levels, especially since salaries and benefits for AML project managers and inspectors predominantly derive from construction funds? Would funding cover current staffing levels? If not, how will OSM determine the funding criteria for administrative program grants?
- How does OSM expect the states and tribes to handle emergency projects under the legislative proposal? Must these projects undergo review by the Advisory Council? Will there be special, expedited procedures? If a state/tribe has to cut back on staff, how does it manage emergencies when they arise? If emergency programs do compete for AML funds, considerable time and effort could be spent preparing these projects for review by the Advisory Council rather than abating the immediate hazard. Again, how can we be assured that emergencies will be addressed expeditiously?
- One of the greatest benefits of reauthorization under the 2006 Amendments to SMCRA was the predictability of funding levels through the end of the AML program. Because states and tribes were provided with hypothetical funding levels from OSM, long-term project planning, along with the establishment of appropriate staffing levels and project assignments, could be made accurately and efficiently. How can states/tribes plan for future projects given the inherent uncertainty associated with having to annually bid for AML funds?

Given these uncertainties and the negative implications for the accomplishment of AML work under Title IV of SMCRA, Congress should reject the proposed amendments to SMCRA as being counterproductive to the purposes of SMCRA and an inefficient use of funds. We request that Congress continue mandatory funding for certified states and tribes and provide funding for AML emergencies. A resolution to this effect adopted by NAAMLPP last year is attached, as is a more comprehensive list of questions concerning the legislative proposal. We ask that they be included in the record of the hearing.

On a somewhat related matter, there appears to be increasing concern by some in Washington that the states and tribes are not spending the increased AML grant moneys that they have received under the 2006 Amendments in a more expeditious manner, thus resulting in what the Administration has characterized as unacceptable levels of “undelivered orders”. What these figures and statements fail to reflect is the degree to which AML grant moneys are obligated or otherwise committed for AML reclamation work as part of the normal grant process. Most AML grants are either three or five years in length and over that course of time, the states and tribes are in a continual process of planning, bidding and contracting for specific AML projects. Some projects are multi-layered and require extended periods of time to complete this process before a shovel is turned at the AML site. And where federal funding is concerned, additional time is necessary to complete the myriad statutory approvals for AML work to begin, including compliance with the National Environmental Policy Act and the National Historic Preservation Act.

In almost every case, however, based on the extensive planning that the states and tribes undertake, AML grant funds are committed to specific projects even while clearances and bidding are underway. While funds may not technically be “obligated” because they are not yet “drawn down”, these funds are committed for specific purposes. Once committed, states and tribes consider this grant money to be obligated to the respective project, even though the “order” had not been “delivered” and the funds actually “drawn down”. The latter can only occur once the project is completed, which will often be several years later, depending on the size and complexity of the project. We would be happy to provide the Subcommittee with more detailed information about our grant expenditures and project planning in order to answer any questions you may have about how we account for and spend our AML grant moneys. Given the confusion that often attends the various terms used to describe the grant expenditure process, we believe it is critical that Congress hear directly from the states and tribes on this matter and not rely solely on the Adminis-

tration's statements and analyses. We welcome the opportunity to brief your Subcommittee in more detail regarding this issue should you so desire.

One of the more effective mechanisms for accomplishing AML restoration work is through leveraging or matching other grant programs, such as EPA's 319 program. Until FY 2009, language was always included in OSM's appropriation that encouraged the use of these types of matching funds, particularly for the purpose of environmental restoration related to treatment or abatement of acid mine drainage (AMD) from abandoned mines. This is an ongoing, and often expensive, problem, especially in Appalachia. NAAMLPP therefore requests the Subcommittee to support the inclusion of language in the FY 2013 appropriations bill that would allow the use of AML funds for any non-Federal cost-share required by the Federal government for AMD treatment or abatement.

We also urge the Subcommittee to support funding for OSM's training program and TIPS, including moneys for state/tribal travel. These programs are central to the effective implementation of state and tribal AML programs as they provide necessary training and continuing education for state/tribal agency personnel, as well as critical technical assistance. Finally, we support funding for the Watershed Cooperative Agreements in the amount of \$1.2 million because it facilitates and enhances state and local partnerships by providing direct financial assistance to watershed organizations for acid mine drainage remediation.

To the extent that the Subcommittee desires to pursue changes to SMCRA to improve or clarify the operation of the AML program, the states and tribes would recommend looking at three areas: 1) the use of unappropriated state and tribal share balances to address noncoal AML and acid mine drainage (AMD) projects; 2) the limited liability protections for noncoal AML work at section 405(1) of SMCRA; and 3) an amendment to Section 413(d) regarding liability under the Clean Water Act for acid mine drainage projects. In this regard, Mr. Chairman, we were very encouraged that the full House Committee on Natural Resources last week passed S. 897, which is identical to H.R. 785 introduced by Rep. Pearce of New Mexico. As we noted in testimony presented to the Subcommittee on February 17 at a legislative hearing on H.R. 785, the bill will return states and tribes to their longstanding role under SMCRA of directing abandoned mine grant funds to the highest priority needs at either coal or non-coal abandoned mines and allow us to designate additional moneys to address acid mine drainage concerns. It will also correct a misinterpretation by the Interior Department in its final rules implementing the 2006 Amendments to SMCRA that barred the states and tribes from using AML monies for these valid and worthy purposes.

States and Tribes are very familiar with the highest priority non-coal problems within their borders and also have limited reclamation dollars to protect public health and safety or protect the environment from significant harm. States and tribes work closely with various federal agencies, including the Environmental Protection Agency, the Bureau of Land Management, the U.S. Forest Service, and the U.S. Army Corps of Engineers, all of whom have provided some funding for non-coal mine remediation projects. For states with coal mining, the most consistent source of AML funding has been the Title IV grants received under SMCRA. Section 409 of SMCRA allows states to use these grants at high priority non-coal AML sites. The funding is generally limited to safeguarding hazards to public safety (e.g., closing mine openings) at non-coal sites.

The urgency of advancing the legislation passed by the full Committee has been heightened by statements in OSM's proposed budget for Fiscal Year 2013. Therein, OSM is proposing to further restrict the ability of states to expend AML funds on noncoal reclamation projects. This will apparently occur as part of a legislative proposal that the Administration intends to aggressively pursue in the 112th Congress. While the primary focus of that proposal will be the elimination of future AML funding for states and tribes that are certified under Title IV of SMCRA (which we adamantly oppose), OSM's proposal will also substantially restructure the method by which AML funds are distributed to the states in an effort to "direct the available reclamation funds to the highest priority coal AML sites across the Nation."

S. 897 would also address a similar restriction on the use of the unappropriated state and tribal share balances for the Acid Mine Drainage (AMD) set-aside program under SMCRA. Congress expanded this program in the 2006 Amendments to allow states and tribes to set-aside up to 30% of their grants funds for treating AMD now and into the future. AMD has ravaged many streams throughout the country, but especially in Appalachia. The states need the ability to set aside as much funding as possible to deal with these problems over the long term. Again, OSM has acted arbitrarily in their interpretation of the reauthorizing language by limiting the types of funds the state may use for the set-aside program. S. 897 includes language that would correct this misinterpretation and allow the states to apply the

30% set-aside to their prior balance replacement funds and as such we strongly support it. We are hopeful that the full House of Representatives will act on S. 897 in the near future.

Another suggested amendment is needed to clarify a further misinterpretation of SMCRA contained in OSM's final rules of November 14, 2008. Section 405(l) of SMCRA provides that, except for acts of gross negligence or intentional misconduct, "no state (or tribe) shall be liable under any provisions of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out a state abandoned mine reclamation plan approved under this section." In its rules, OSM concluded that because of the language of SMCRA, including the generally unrestricted nature of the Title IV funds provided to certified states and tribes in Sections 411(h)(1) and (2), certified states and tribes can no longer conduct noncoal reclamation or other projects under Title IV of SMCRA (73 Fed. Reg. 67613). Thus, to the extent that certified states and tribes choose to conduct noncoal reclamation, OSM asserts that they do so outside of SMCRA and OSM's regulations, including the limited liability provisions of Section 405(l) of the Act.

This strained reading of the 2006 Amendments is having severe consequences for certified states and tribes conducting AML work pursuant to their otherwise-approved state programs. Without this limited liability protection, these states and tribes potentially subject themselves to liability under the Clean Water Act and CERCLA for their AML reclamation work. Nothing in the 2006 Amendments suggested that there was a desire or intent to remove these liability protections, and without them in place, certified states and tribes will need to potentially reconsider at least some of their more critical AML projects. We therefore recommend that the Subcommittee consider an amendment to SMCRA that would clarify that the 2006 Amendments were not intended to affect the applicability of section 405(l) to AML projects undertaken by certified states and tribes. We would welcome an opportunity to work with you to craft appropriate legislative language at an appropriate time to accomplish this.

Finally, we recommend an adjustment to Section 413(d) of SMCRA to clarify that acid mine drainage projects which are eligible for AML funding under Section 404 of the Act, including systems for the control or treatment of AMD, are not subject to the water quality provisions of the Federal Water Pollution Control Act. This amendment is necessary to address a November 8, 2010 decision by the U.S. Court of Appeals for the Fourth Circuit, which decreed that the Clean Water Act's NPDES permitting requirements apply to anyone who discharges pollutants into the waters of the United States, regardless of whether that entity is private or public in nature. More specifically, the court noted that "the statute contains no exceptions for state agencies engaging in reclamation efforts; to the contrary, it explicitly includes them within its scope."

The result of this far-reaching decision by the Fourth Circuit will be to require some, if not all, state and tribal AML reclamation projects to obtain NPDES permits before work can commence. This will be particularly problematic for acid mine drainage control and treatment projects where water quality is already significantly degraded and is unlikely to ever meet effluent limitation guidelines under the Clean Water Act. Essentially, efforts by state agencies and tribes, and the watershed groups who work cooperatively with the states and tribes, will be stymied. In some cases, existing water treatment systems could be turned off and abandoned to the inability to obtain NPDES permits. We do not believe that this result was intended by either Congress or the courts, and thus believe that an immediate legislative clarification should be pursued. Again, we would welcome the opportunity to work with this Subcommittee to craft appropriate legislative solutions to address this conflict of laws situation at some time in the near future.

Thank you for the opportunity to testify today. I would be happy to answer any questions you may have.

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#### **Questions and Concerns re the AML Legislative Proposal in OSM's FY 2013 Budget**

##### **The Proposed Competitive Allocation Process**

- What is the potential for this new review and ranking process to reduce expenditures and increase efficiency without being counter-productive? Will it introduce an additional level of bureaucracy and result in more time being spent formulating proposals and less on actual AML reclamation? The present funding formula, while not perfect, at least provides some direction on which to base long term strategic planning and efficient use of available funds. The closest analogy to what OSM is proposing by way of its competitive allocation process

is the way BLM and the Forest Service currently allocate their AML funds through competitive proposals to various state offices and regions. Because of the uncertainties of funding, neither agency has been able to develop significant in-house expertise, but instead often rely on SMCRA-funded states like MT, NM, UT and CO to do a good portion of their AML work. Why would OSM want to duplicate a system that has proven problematic for other agencies?

- Who would be the “other parties” potentially bidding on AML grant funds? Would this include federal agencies such as BLM, FS, NPS, etc? If so, in many cases, those agencies already rely on the states to conduct their reclamation work and also determine priorities based on state input or guidance.
- What do the state project managers and inspectors do if a state does not win a competitive bid for AML funds? How does a state gear up if it receives funding for more projects than it can handle with present staffing? Each state and tribe has different grant cycles. Unless all are brought into one uniform cycle, how will everyone compete for the same dollars? In this regard, how can the competitive allocation process and the use of the Advisory Council be more efficient and simple than what we already have in place?
- How long will OSM fund a state’s/tribe’s administrative costs if it does not successfully compete for a construction grant, even though the state/tribe has eligible high priority projects on AMLIS? How will OSM calculate administrative grant funding levels, especially since salaries and benefits for AML project managers and inspectors predominantly derive from construction funds? Would funding cover current staffing levels? If not, how will OSM determine the funding criteria for administrative program grants?
- How do the states and tribes handle emergency projects under the legislative proposal? Must these projects undergo review by the Advisory Council? Will there be special, expedited procedures? If a state/tribe has to cut back on staff, how does it manage emergencies when they arise? If emergency programs do compete for AML funds, considerable time and effort could be spent preparing these projects for review by the Advisory Council rather than abating the immediate hazard. Again, how can we be assured that emergencies will be addressed expeditiously?
- What ranking criteria will be used to determine the priority of submitted AML project grant requests? The number of people potentially affected? The current priority ranking on AMLIS? How would the Council determine whether a burning gob pile near a city presents a greater hazard than a surface mine near a highway or an underground mine beneath a residential area? Would the winning bid be the “most convincing” proposal? The one with the most signatures on a petition? The one with the most influential legislative delegation? Will AMLIS continue to serve as the primary mechanism for identifying sites and their priority status?
- If the current AML funding formula is scrapped, what amount will be paid out to the non-certified AML states and tribes over the remainder of the program? What does OSM mean by the term “remaining funds” in its proposal? Is it only the AML fees yet to be collected? What happens to the historic share balances in the Fund, including those that were supposed to be re-directed to the Fund based on an equivalent amount of funding being paid to certified states and tribes each year? Would the “remaining funds” include the unappropriated/prior balance amounts that have not yet been paid out over the seven-year installment period? What about the amounts due and owing to certified states and tribes that were phased in during FY 2009—2011?
- Has anyone alleged or confirmed that the states/tribes are NOT already addressing the highest priority sites for reclamation within the context of the current AML program structure under the 2006 Amendments? Where have the 2006 Amendments faltered in terms of high priority sites being addressed as envisioned by Congress? What would remain unchanged in the 2006 Amendments under OSM’s proposal?

#### **The Nature and Purpose of the Advisory Council**

- Who would be on the AML Advisory Council and how could they collectively have better decision-making knowledge about hazardous AML sites than the state and tribal project managers and administrators who work with these sites on a daily basis?
- What will be the criteria to serve on the Advisory Council? Will the Federal Advisory Committee Act (FACA) requirements apply to the formation and deliberations of the Council? How long does OSM envision it will take to establish the Council and when will it become operational?

- Will the Advisory Council be providing recommendations to OSM or will OSM make all final decisions? Will these decisions be appealable? If so, to who? Does OSM envision needing to develop internal guidance for its own review process? If so, how long will it potentially take from Advisory Council review and recommendation to final OSM decision in order to complete the grant process so a state can begin a project?
- What degree of detail will be required in order to review and approve competitive grant applications? Will the Council review each project? What type of time constraints will be placed on their review?
- Will the Advisory Council consider partial grants for projects that may exceed the allocation for a single year? Would minimum program states be authorized to apply for a grant that would exceed \$3 million?
- Will grant applications be based on an individual project or will the grant be based on a project year? How will cost overruns be handled?

#### **Planning for AML Work**

- One of the greatest benefits of reauthorization under the 2006 Amendments to SMCRA was the predictability of funding through the end of the AML program. Because state and tribes were provided with hypothetical funding levels from OSM (which to date have proven to be quite accurate), long-term project planning, along with the establishment of appropriate staffing levels and project assignments, could be made more accurately and efficiently. How can states/tribes plan for future projects given the uncertainty associated with having to annually bid for AML funds? NEPA compliance issues alone can take years of planning. One state recently asked its State Historic Preservation Office for initial consultation regarding project sites that may be reclaimed over the next five years. This process will also have significant impacts on those states that utilize multi-year construction contracts that are paid for with annual AML grants.
- State and tribal AML projects are often planned 18 months to two years in advance of actually receiving construction funds, based on anticipated funding under the 2006 Amendments. During that time, states and tribes are performing environmental assessments, conducting archeology reviews, completing real estate work and doing NEPA analyses. There could be considerable effort and money wasted if a project does not get approved during the competitive allocation process.
- At what point does a State or Tribe seek approval from the advisory council? Considerable investigation must take place prior to developing most projects, whether they be acid mine drainage projects or health and safety projects. How much time should be spent in design prior to proceeding to the Council? How accurate must a cost estimate be prior to taking a project before the Council? The greater the accuracy, the greater the design time expended, possibly for a project that will be rejected.
- State and tribes often seek and obtain valuable matching funds from watershed groups, which take considerable lead time to acquire. It will be difficult to commit to partners if we don't know what level of funding, if any, will be made available from OSM.
- Several states have committed significant amounts of money to waterline projects across the coalfields. Local governmental entities have started designs and applied for additional funds from other agencies to match AML funds in order to make these projects a reality. Ending all AML funding for these projects (assuming they are not considered "high priority") could have significant consequences for local communities. Our understanding is that these projects were excluded under the 2006 Amendments from the priority scheme contained in section 403(a) of SMCRA.
- Does OSM's proposal allow acid mine drainage (AMD) projects to be undertaken? Can these be designated as high priority? (Our understanding is that those AMD projects undertaken pursuant to the "AMD set-aside program" are not subject to the priority scheme under Section 403(a) and that those AMD projects done "in conjunction with" a priority 1 or 2 project are considered "high priority".) How do states handle ongoing engineering, operating and maintenance costs for existing AMD treatment systems? As the Administration works diligently to develop a new rule to protect streams nationwide, why would it advance a proposal to essentially halt the cleanup of streams funded by the AML program?

#### **Overarching Concerns**

- Given the original design of SMCRA by its framers that AML funds will only be allocated to those states who agree to implement Title V regulatory programs

for active mining operations, to what extent can we expect that states will continue to implement and fund their Title V programs if Title IV funding is drastically cut or eliminated under the proposal? Furthermore, since states and tribes will not know what level of AML program staffing to maintain from year to year under the proposal, who would desire to work for a program that is in a constant state of flux?

- The SMCRA 2006 Amendments were the result of roughly ten years of negotiations, discussions, and debates in Congress. Since the legislative process to enact these new proposed changes could take years, why didn't OSM begin with the legislation and then follow up with an appropriate budget proposal? Why weren't the states/tribes or the NAAMLPA included in discussions that led to this legislative proposal?
- As OSM develops the legislative proposal for a competitive bidding process, the agency should consider the impacts on minimum programs and consider maintaining the minimum allocation of \$3 million for minimum program states.
- What type of state AML plan amendments does OSM foresee as a result of this new process?

#### **Proposed Elimination of Funding for AML Emergencies**

- While amendments to Title IV of SMCRA in 2006 (P.L. 109–432) adjusted several provisions of the Act, no changes were made to OSM's emergency powers in Section 410. Quite to the contrary, Section 402(g)(1)(D)(2) states that the Secretary shall ensure "strict compliance" with regard to the states' and tribes' use of non-emergency grant funds for the priorities listed in Section 403(a), none of which include emergencies. The funding for the emergency program comes from the Secretary's discretionary share, pursuant to Section 402(g)(3) of the Act. This share currently stands at \$416 million. OSM's elimination of funding for the emergency program will result in the shift of approximately \$20 million annually that will have to be absorbed by the states. This is money that cannot be spent on high priority AML work (as required by SMCRA) and will require the realignment of state AML program operations in terms of personnel, project design and development, and construction capabilities. In most cases, depending on the nature and extent of an emergency project, it could preclude a state's ability to undertake any other AML work during the grant year (and even following years), especially for minimum program states. How does OSM envision states and tribes being able to meet their statutory responsibility to address high priority AML sites in light of the elimination of federal funding for AML emergencies? How does OSM reconcile this proposal with the intentions of Congress expressed in the 2006 amendments to move more money out of the AML Fund sooner to address the backlog of AML problems that continue to linger?

#### **Proposed Elimination of Funding to Certified States and Tribes**

- From what we can ascertain, OSM proposes to eliminate all payments to certified states and tribes—in lieu of funds; prior balance replacement funds; and monies that are due and owing in FY 2018 and 2019 from the phase-in during fiscal years 2008 and 2009. Is this accurate? OSM says nothing of what the impact will be on non-certified states as a result of eliminating these payments to certified states and tribes—especially the equivalent payments that would otherwise be made to the historic production share that directly relate to "in lieu of" payments to certified states and tribes under section 411(h)(4). Previously, OSM has stated that "the amounts that would have been allocated to certified states and tribes under section 402(g)(1) of SMCRA will be transferred to the historical production allocation on an annual basis **to the extent that those states and tribes receive in lieu payments from the Treasury (through the Secretary of the Interior) under section 402(i) and 411(h)(2) of SMCRA.**" By OSM's own admission in its FY 2013 proposed budget, this will amount to \$1.2 billion over ten years. If the in lieu payments are not made (as proposed), how can the transfer to historic production occur? The result, of course, would be a drastic impact on the historic production allocation otherwise available to uncertified states. Will OSM address this matter in its proposed legislation? If so, how?
- Has OSM considered the fiscal and programmatic impacts that could result if the certified states and tribes, who no longer receive AML monies, choose to return their Title V regulatory programs to OSM (especially given the severe reductions being proposed for FY 2013 in Title V grants)?
- Finally, how do the cuts in the Title IV program line up with the Administration's other economic, fiscal and environmental objectives as articulated in the deficit reduction and jobs bills that have been considered by Congress? These

objectives include environmental stewardship, cleaning up abandoned mines (coal and noncoal) nationwide, creating green jobs, pumping dollars into local communities, putting money to work on the ground in an expeditious manner, sustainable development, infrastructure improvements, alternative energy projects, protecting public health and safety, and improving the environment. It seems to us that there is a serious disconnect here and we remain mystified as to how these laudable objectives and OSM's budget proposal can be reconciled.

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**RESOLUTION  
OF  
THE NATIONAL ASSOCIATION OF ABANDONED MINE LAND PROGRAMS**

WHEREAS, Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Abandoned Mine Land (AML) reclamation program; and

WHEREAS, the National Association of Abandoned Mine Land Programs (NAAML) was established as a nonprofit corporation to accomplish the objectives of its thirty member tribes and states to eliminate health and safety hazards and reclaim land and water resources adversely affected by past mining and left in an abandoned or inadequately restored condition; and

WHEREAS, NAAML members administer AML programs funded and overseen by the Office of Surface Mining Reclamation and Enforcement (OSM), U.S. Department of the Interior; and

WHEREAS, pursuant to the cooperative federalism approach contained in SMCRA, all tribes and states who are members of NAAML have federally approved abandoned mine reclamation plans; and

WHEREAS, SMCRA, Title IV, establishes a reclamation fee on each ton of coal mined in the United States to pay for abandoned mine land reclamation; and

WHEREAS, SMCRA, Title IV, mandates that fifty percent (50%) of the reclamation fees collected annually are designated as state/tribal share funds to be returned to the states and tribes from which coal was mined to pay for reclamation programs administered by the states and tribes; and

WHEREAS, SMCRA Title IV also mandates that a minimum level of funding should be provided to ensure effective state program implementation; and

WHEREAS, Congress enacted amendments to SMCRA in 2006 to address, among other things, funding for state and tribal programs and fee collection to address existing and future AML reclamation; and

WHEREAS, the 2006 Amendments established new, strict criteria that ensures states and tribes expend funds on high priority AML sites; and

WHEREAS, the proposed 2012 budget for the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of the Interior would abandon the 50/50 state-federal partnership established under SMCRA and renege on the funding formula under the 2006 amendments by, among other things, eliminating mandatory funding for those states and tribes who have certified the completion of their coal reclamation work and adjusting the mechanism by which non-certified states receive their mandatory funding through a competitive bidding process; and

WHEREAS, if statutory changes are approved by Congress as suggested by the proposed FY 2012 budget for OSMRE, reclamation of abandoned mine lands within certified states and tribes would halt; reclamation of abandoned mine lands in all states would be jeopardized; employment of contractors, suppliers, technicians and others currently engaged in the reclamation of abandoned mine lands would be endangered; the cleanup of polluted lands and waters across the United States would be threatened by failing to fund reclamation of abandoned mine lands in some states; minimum program state funding would be usurped; the AML water supply replacement program would be terminated, leaving coalfield citizens without potable water; and the intent of Congress as contained in the 2006 amendments to SMCRA and its 2006 Amendments would be undermined

NOW, THEREFORE:

BE IT RESOLVED BY THE NATIONAL ASSOCIATION OF ABANDONED MINE LAND PROGRAMS THAT ITS MEMBER TRIBES AND STATES:

Opposes the legislative proposal terminating funding for certified states and tribes and altering the receipt of mandatory AML funding for non-certified states contained in the FY 2012 budget proposal for the Office of Surface Mining Reclamation and Enforcement and instead supports the AML funding mechanism contained in current law.

ISSUED THIS 22nd DAY OF FEBRUARY, 2011

ATTEST:  
Michael P. Garner  
PRESIDENT, NAAML

ALABAMA ALASKA ARIZONA ARKANSAS CALIFORNIA COLORADO  
CROW HOPI ILLINOIS INDIANA IOWA KANSAS KENTUCKY, LOUISIANA  
MARYLAND,, MISSISSIPPI, MISSOURI MONTANA NAVAJO NEVADA, NEW  
MEXICO NORTH DAKOTA OHIO OKLAHOMA PENNSYLVANIA TEN-  
NESSEE TEXAS UTAH VIRGINIA WEST VIRGINIA WYOMING

Mr. JOHNSON [presiding]. Thank you, Ms. Roanhorse. Mr. Conrad, you may now begin.

**STATEMENT OF GREGORY E. CONRAD, EXECUTIVE DIRECTOR,  
INTERSTATE MINING COMPACT COMMISSION**

Mr. CONRAD. Good morning. My name is Greg Conrad, and I serve as Executive Director of the Interstate Mining Compact Commission, on whose behalf I am appearing today to present the views of the compact's 24 member States concerning the Fiscal Year 2013 budget request for the Office of Surface Mining, and its impacts on state programs.

In its proposed budget, OSM is requesting \$57.3 million to fund Title V grants to States for the implementation of the regulatory programs, a reduction of \$11 million, or 15 percent below the 2012-enacted level. Mr. Chairman, these are admittedly tough times for State and Federal budgets. We realize that deficit reduction and spending cuts are the order of the day for both the Nation and our respective States. As a result, some hard choices need to be made about how we spend limited dollars in an efficient and effective way.

Environmental protection associated with mining operations is no exception. One of the tough choices that has to be made with respect to programs under the Surface Mining Control and Reclamation Act is who will take the lead in implementing the Act's requirements.

Once we agree upon that, it is incumbent on both state and Federal Governments to prioritize funding decisions to support the lead agencies. Congress crafted a state primacy approach under SMCRA, whereby state governments were vested with exclusive regulatory authority to operate programs for active mining operations and abandoned mine land reclamation. The Act also provides for grants to States that meet 50 percent of their program operating costs under Title V, and 100 percent for AML projects under Title IV.

Once again, in Fiscal Year 2013, we are faced with a decision about the extent to which the Federal Government will support these funding commitments under SMCRA, and the State-led concept for program implementation. OSM's budget proposes to move us away from those commitments and concepts. The Administration would have us believe that the Federal Government is in a better position to decide how the state programs should be run, and that the States should do so with less money and more oversight.

At the very same time, additional mandates and program requirements are being placed upon the States through new rules, directives, guidelines, and agreements among Federal agencies. Something has to give, Mr. Chairman. Either we support the



States, as envisioned by SMCRA, or we change the rules of the game. States are struggling to match Federal dollars, and signals from the Federal Government that it is wavering in its support concerning both dollars and confidence in the States' ability to run effectively regulatory and AML programs will do little to build trust.

This is not the time to reverse the course that Congress has set for its support of state programs over the past several years. In this regard, it should be kept in mind that a 15 percent cut in Federal funding translates to an additional 15 percent cut for overall program funding for many states, since these states can only match what they receive in Federal money.

We, therefore, urge the Subcommittee to reject OSM's proposed cut of \$11 million for state Title V grants, and restore the grant level to \$70 million, as supported by state funding requests. It is important to note that OSM does not disagree with the States' demonstrated need for the requested amount of funding for Title V regulatory grants. Instead, OSM's solution for the drastic cut comes in the way of an unrealistic assumption that the States can simply increase user fees.

OSM's proposal is completely out of touch with the realities associated with establishing or enhancing user fees. IMCC's polling of its member States confirmed that it will be difficult, if not impossible, for most States to accomplish this feat at all, let alone in one fiscal year. As an example, it took the State of Alabama one year of concerted effort to secure a program amendment to increase its permit fees with approval from OSM. We strongly urge the Subcommittee to reject this approach.

If Congress is seeking to restrain OSM's budget, we suggest that the Subcommittee look seriously at OSM's proposal to increase its own budget by almost \$4 million and 25 FTEs for Federal oversight of State programs. In making the case for its funding increase, OSM's budget justification document contains vague references to the need to "improve the implementation of existing laws," and to "strengthen OSM's skill base."

In our view, this is code language for enhanced and expanded Federal oversight of State programs. However, without more to justify the need for enhanced oversight, Congress should reject this proposed increase for Federal operations. The overall performance of the States, as detailed in OSM's annual State program evaluation reports, demonstrates that the States are implementing their programs effectively, and in accordance with the purposes and objectives of SMCRA.

The States also have serious concerns with several aspects of OSM's enhanced oversight initiative, especially three directives on annual oversight procedures, corrective actions, and the issuance of 10-day notices. We are particularly concerned about the potential for these Federal actions to duplicate and/or second-guess State permitting decisions. Aside from the impact on limited State and Federal resources, these actions undermine the principles of primacy that underscore SMCRA, and are likely to have debilitating impacts on the State-Federal partnership envisioned by the Act.

Thank you for the opportunity to appear today; I would be happy to answer any questions.

[The prepared statement of Mr. Conrad follows:]

**Statement of Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission, on Behalf of the Interstate Mining Compact Commission**

My name is Gregory E. Conrad and I serve as Executive Director of the Interstate Mining Compact Commission, on whose behalf I am appearing today. I appreciate the opportunity to present this statement to the Subcommittee regarding the views of the Compact's 24 member states on the Fiscal Year (FY) 2013 Budget Request for the Office of Surface Mining Reclamation and Enforcement (OSM) within the U.S. Department of the Interior. In its proposed budget, OSM is requesting \$57.3 million to fund Title V grants to states and Indian tribes for the implementation of their regulatory programs, a reduction of \$11 million or 15% below the FY 2012 enacted level. OSM also proposes to reduce mandatory spending for abandoned mine lands (AML) program by \$180 million pursuant to a legislative proposal to eliminate all AML funding for certified states and tribes.

The Compact is comprised of 24 states that together produce some 95% of the Nation's coal, as well as important noncoal minerals. The Compact's purposes are to advance the protection and restoration of land, water and other resources affected by mining through the encouragement of programs in each of the party states that will achieve comparable results in protecting, conserving and improving the usefulness of natural resources and to assist in achieving and maintaining an efficient, productive and economically viable mining industry.

OSM has projected an amount of \$57.3 million for Title V grants to states and tribes in FY 2012, an amount which is matched by the states each year. These grants support the implementation of state and tribal regulatory programs under the Surface Mining Control and Reclamation Act (SMCRA) and as such are essential to the full and effective operation of those programs. Pursuant to these primacy programs, the states have the most direct and critical responsibilities for conducting regulatory operations to minimize the impact of coal extraction operations on people and the environment. The states accomplish this through a combination of permitting, inspection and enforcement duties, designating lands as unsuitable for mining operations, and ensuring that timely reclamation occurs after mining.

In Fiscal Year 2012, Congress approved \$68.6 million for state Title V grants. This continued a much-needed trend whereby the amount appropriated for these regulatory grants aligned with the demonstrated needs of the states and tribes. The states are greatly encouraged by the significant increases in Title V funding approved by Congress over the past three fiscal years. Even with mandated rescissions and the allocations for tribal primacy programs, the states saw a \$12 million increase for our regulatory programs over FY 2007 levels. State Title V grants had been stagnant for over 12 years and the gap between the states' requests and what they received was widening. This debilitating trend was compounding the problems caused by inflation and uncontrollable costs, thus undermining our efforts to realize needed program improvements and enhancements and jeopardizing our efforts to minimize the potential adverse impacts of coal extraction operations on people and the environment.

In its FY 2013 budget, OSM has once again attempted to reverse course and essentially unravel and undermine the progress made by Congress in supporting state programs with adequate funding. As states prepare their future budgets, we trust that the recent increases approved by Congress will remain the new base on which we build our programs. Otherwise, we find ourselves backpedaling and creating a situation where those who were just hired face layoffs and purchases of much needed equipment are canceled or delayed. Furthermore, a clear message from Congress that reliable, consistent funding will continue into the future will do much to stimulate support for these programs by state legislatures and budget officers who each year, in the face of difficult fiscal climates and constraints, are also dealing with the challenge of matching federal grant dollars with state funds. In this regard, it should be kept in mind that a 15% cut in federal funding generally translates to an additional 15% cut for *overall* program funding for many states, especially those without federal lands, since these states can generally only match what they receive in federal money.

OSM's solution to the drastic cuts for state regulatory programs comes in the way of an unrealistic assumption that the states can simply increase user fees in an effort to "eliminate a de facto subsidy of the coal industry." No specifics on how the states are to accomplish this far-reaching proposal are set forth, other than an expectation that they will do so in the course of a single fiscal year. OSM's proposal is completely out of touch with the realities associated with establishing or enhanc-

ing user fees, especially given the need for approvals by state legislatures. IMCC's polling of its member states confirmed that, given the current fiscal and political implications of such an initiative, it will be difficult, if not impossible, for most states to accomplish this feat at all, let alone in less than one year. OSM is well aware of this, and yet has every intention of aggressively moving forward with a proposal that was poorly conceived from its inception. We strongly urge the Subcommittee to reject this approach and mandate that OSM work through the complexities associated with any future user fees proposal in close cooperation with the states and tribes before proposing cuts to federal funding for state Title V grants.

At the same time that OSM is proposing significant cuts for state programs, the agency is proposing sizeable increases for its own program operations (\$4 million) for federal oversight of state programs, including an increase of 25 FTEs. In making the case for its funding increase, OSM's budget justification document contains vague references to the need "to improve the implementation of existing laws" and to "strengthen OSM's skills base." More specifically, OSM states in its budget justification document (on page 60) that "with greater technical skills, OSM anticipates improved evaluation of permit-related actions and resolution of issues to prevent unanticipated situations that otherwise may occur as operations progress, thereby improving implementation of existing laws". In our view, this is code language for enhanced and expanded federal oversight of state programs. However, without more to justify the need for more oversight and the concomitant increase in funding for federal operations related thereto, Congress should reject this request. The overall performance of the states as detailed in OSM's annual state program evaluation reports demonstrates that the states are implementing their programs effectively and in accordance with the purposes and objectives of SMCRA.<sup>1</sup>

In our view, this suggests that OSM is adequately accomplishing its statutory oversight obligations with current federal program funding and that any increased workloads are likely to fall *upon the states*, which have primary responsibility for implementing appropriate adjustments to their programs identified during federal oversight. In this regard, we note that the federal courts have made it abundantly clear that SMCRA's allocation of exclusive jurisdiction was "careful and deliberate" and that Congress provided for "mutually exclusive regulation by either the Secretary or state, but not both." *Bragg v. West Virginia Coal Ass'n*, 248 F. 3d 275, 293-4 (4th Cir. 2001), cert. Denied, 534 U.S. 1113 (2002). While the courts have ruled consistently on this matter, the question remains for Congress and the Administration to determine, in light of deficit reduction and spending cuts, how the limited amount of federal funding for the regulation of surface coal mining and reclamation operations under SMCRA will be directed—to OSM or the states. For all the above reasons, we urge Congress to approve not less than \$70 million for state and tribal Title V regulatory grants, as fully documented in the states' and tribes' estimates for actual program operating costs.<sup>2</sup>

With regard to funding for state Title IV Abandoned Mine Land (AML) program grants, Congressional action in 2006 to reauthorize Title IV of SMCRA has significantly changed the method by which state reclamation grants are funded. Beginning with FY 2008, state Title IV grants are funded primarily by mandatory appropriations. As a result, the states should have received a total of \$488 million in FY 2013. Instead, OSM has budgeted an amount of \$307 million based on an ill-conceived proposal to eliminate mandatory AML funding to states and tribes that have been certified as completing their abandoned coal reclamation programs. This \$180 million reduction flies in the face of the comprehensive restructuring of the AML program that was passed by Congress in 2006, following over 10 years of Congressional debate and hard fought compromise among the affected parties. In addition to the

<sup>1</sup> While not alluded to or fully addressed in OSM's budget justification document, there are myriad statutory, policy and legal issues associated with several aspects of the agency's enhanced oversight initiative, especially three recently adopted directives on annual oversight procedures (REG-8), corrective actions (REG-23) and Ten-Day Notices (INE-35). IMCC submitted extensive comments regarding the issues associated with these directives and related oversight actions (including federal inspections) on January 19, 2010, July 8, 2010 and January 7, 2011.

<sup>2</sup> We are particularly concerned about recent OSM initiatives, primarily by policy directive, to duplicate and/or second-guess state permitting decisions through the reflexive use of "Ten-Day Notices" as part of increased federal oversight or through federal responses to citizen complaints. OSM specifically addresses this matter in its budget justification document (on page 69) where it states that "OSM has an obligation under section 521 of SMCRA to take steps to ensure that all types of violations, including violations of performance standards or permit conditions and violations of permitting requirements, are corrected if the state does not take action to do so. Aside from the impact on limited state and federal resources, these actions undermine the principles of primacy that underscore SMCRA and are likely to have debilitating impacts on the state-federal partnership envisioned by the Act.

elimination of funding for certified states and tribes, OSM is also proposing to reform the distribution process for the remaining reclamation funding to allocate available resources to the highest priority coal AML sites through a competitive grant program, whereby an Advisory Council will review and rank AML sites each year. The proposal, which will require adjustments to SMCRA, will clearly undermine the delicate balance of interests and objectives achieved by the 2006 Amendments. It is also inconsistent with many of the goals and objectives articulated by the Administration concerning both jobs and environmental protection. We urge the Congress to reject this unjustified proposal, delete it from the budget and restore the full mandatory funding amount of \$488 million. A resolution adopted by IMCC last year concerning these matters is attached. We also endorse the testimony of the National Association of Abandoned Mine Land Programs (NAAML) which goes into greater detail regarding the implications of OSM's legislative proposal for the states.

We also urge Congress to approve continued funding for the AML emergency program. In a continuing effort to ignore congressional direction, OSM's budget would completely eliminate funding for state-run emergency programs and also for federal emergency projects (in those states that do not administer their own emergency programs). When combined with the great uncertainty about the availability of remaining carryover funds, it appears that the program has been decimated. Funding the OSM emergency program should be a top priority for OSM's discretionary spending. This funding has allowed the states and OSM to address the unanticipated AML emergencies that inevitably occur each year. In states that have federally-operated emergency programs, the state AML programs are not structured or staffed to move quickly to address these dangers and safeguard the coalfield citizens whose lives and property are threatened by these unforeseen and often debilitating events. And for minimum program states, emergency funding is critical to preserve the limited resources available to them under the current funding formula. We therefore request that Congress restore funding for the AML emergency program in OSM's FY 2013 budget.

On a somewhat related matter, there appears to be increasing concern by some in Washington that the states and tribes are not spending the increased AML grant moneys that they have received under the 2006 Amendments in a more expeditious manner, thus resulting in what the Administration has characterized as unacceptable levels of "undelivered orders". What these figures and statements fail to reflect is the degree to which AML grant moneys are obligated or otherwise committed for AML reclamation work as part of the normal grant process. Most AML grants are either three or five years in length and over that course of time, the states and tribes are in a continual process of planning, bidding and contracting for specific AML projects. Some projects are multi-layered and require extended periods of time to complete this process before a shovel is turned at the AML site. And where federal funding is concerned, additional time is necessary to complete the myriad statutory approvals for AML work to begin, including compliance with the National Environmental Policy Act and the National Historic Preservation Act.

In almost every case, however, based on the extensive planning that the states and tribes undertake, AML grant funds are committed to specific projects even while clearances and bidding are underway. While funds may not technically be "obligated" because they are not yet "drawn down", these funds are committed for specific purposes. Once committed, states and tribes consider this grant money to be obligated to the respective project, even though the "order" had not been "delivered" and the funds actually "drawn down". The latter can only occur once the project is completed, which will often be several years later, depending on the size and complexity of the project. We would be happy to provide the Subcommittee with more detailed information about our grant expenditures and project planning in order to answer any questions you may have about how we account for and spend our AML grant moneys. Given the confusion that often attends the various terms used to describe the grant expenditure process, we believe it is critical that Congress hear directly from the states and tribes on this matter and not rely solely on the Administration's statements and analyses. We welcome the opportunity to brief your Subcommittee in more detail regarding this issue should you so desire.

One of the more effective mechanisms for accomplishing AML restoration work is through leveraging or matching other grant programs, such as EPA's 319 program. Until FY 2009, language was always included in OSM's appropriation that encouraged the use of these types of matching funds, particularly for the purpose of environmental restoration related to treatment or abatement of AMD from abandoned mines. This is a perennial, and often expensive, problem, especially in Appalachia. IMCC therefore requests the Committee to once again include language in the FY 2013 appropriations bill that would allow the use of AML funds for any required

non-Federal share of the cost of projects by the Federal government for AMD treatment or abatement.

We also urge the Committee to support funding for OSM's training program, including moneys for state travel. These programs are central to the effective implementation of state regulatory programs as they provide necessary training and continuing education for state agency personnel. In this regard, it should be noted that the states provide nearly half of the instructors for OSM's training course and, through IMCC, sponsor and staff benchmarking workshops on key regulatory program topics. IMCC also urges the Committee to support funding for TIPS, a program that directly benefits the states by providing critical technical assistance. Finally, we support funding for the Watershed Cooperative Agreements in the amount of \$1.2 million.

Attached to our testimony today is a list of questions concerning OSM's budget that we request be included in the record for the hearing. The questions go into further detail concerning several aspects of the budget that we believe should be answered before Congress approves funding for the agency or considers advancing the legislative proposals contained in the budget.

Thank you for the opportunity to present this statement. I would be happy to answer any questions you may have or provide additional information to the Subcommittee.

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### Resolution Interstate Mining Compact Commission

BE IT KNOWN THAT:

**WHEREAS**, Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Abandoned Mine Land (AML) reclamation program; and

**WHEREAS**, the Interstate Mining Compact Commission (IMCC) is a multi-state organization representing the natural resource and environmental protection interests of its 24 member states, including the elimination of health and safety hazards and the reclamation of land and water resources adversely affected by past mining and left in an abandoned or inadequately restored condition; and

**WHEREAS**, pursuant to the cooperative federalism approach contained in SMCRA, several IMCC member states administer AML programs approved, funded and overseen by the Office of Surface Mining Reclamation and Enforcement (OSM) within the U.S. Department of the Interior; and

**WHEREAS**, SMCRA, Title IV establishes a reclamation fee on each ton of coal mined in the United States to pay for abandoned mine land reclamation; and

**WHEREAS**, SMCRA, Title IV mandates that fifty percent (50%) of the reclamation fees collected annually are designated as state share funds to be returned to the states from which coal was mined to pay for reclamation projects pursuant to programs administered by the states; and

**WHEREAS**, SMCRA, Title IV also mandates that a minimum level of funding should be provided to ensure effective state program implementation; and

**WHEREAS**, Congress enacted amendments to SMCRA in 2006 to address, among other things, continued collection of AML fees and funding for state programs to address existing and future AML reclamation; and

**WHEREAS**, the 2006 Amendments established new, strict criteria that ensure states expend funds on high priority AML sites; and

**WHEREAS**, the proposed 2012 budget for the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of the Interior would disregard the state-federal partnership established under SMCRA and renege on the funding formula under the 2006 Amendments by, among other things, eliminating mandatory funding for states who have certified the completion of their coal reclamation work and adjusting the mechanism by which non-certified states receive their mandatory funding through a competitive bidding process; and

**WHEREAS**, if statutory changes are approved by Congress as suggested by the proposed FY 2012 budget for OSM, reclamation of abandoned mine lands within certified states would halt; reclamation of abandoned mine lands in all states would be jeopardized; employment of contractors, suppliers, technicians and others currently engaged in the reclamation of abandoned mine lands would be endangered; the cleanup of polluted lands and waters across the United States would be threatened by failing to fund reclamation of abandoned mine lands; minimum program state funding would be usurped; the AML water supply replacement program would be terminated, leaving coalfield citizens without potable water; and the intent of Congress as contained in the 2006 Amendments to SMCRA would be undermined

**NOW THEREFORE BE IT RESOLVED:**

That the Interstate Mining Compact Commission opposes the legislative proposal terminating funding for certified states and altering the receipt of mandatory AML funding for non-certified states contained in the FY 2012 budget proposal for the Office of Surface Mining Reclamation and Enforcement and instead supports the AML funding mechanism contained in current law.

Issued this 10th day of March, 2011

ATTEST:

Gregory E. Conrad  
Executive Director

**Questions re OSM's Proposed FY 2013 Budget**

What does OSM plan to do with the additional \$4 million that has been budgeted for "enhanced federal oversight of state regulatory programs"? How does OSM justify an increase in money for federal oversight while decreasing money for state Title V grants?

What is the demonstrated need for an additional 25 FTEs to perform federal oversight of state programs? Will this not simply lead to duplication of effort, second-guessing of state decision-making, undermining of state primacy and wasted resources?

If pressed by Congress, how expeditiously does OSM intend to push the states to recover more of their regulatory costs from the coal industry through user fees? Has OSM undertaken a full analysis of the administrative and rulemaking complexities inherent in such an undertaking?

OSM's newest AML legislative proposal (to eliminate payments to certified states and tribes and to utilize a competitive bidding process for the allocation of remaining AML reclamation funds for non-certified states) is the fourth time that the agency has put forth potential legislative adjustments to the 2006 amendments to SMCRA in its proposed budgets. Based on the legislative proposal we have seen to date, there are many more questions than answers about how this process will work. (See attached list) Does OSM intend to seek input from the states and tribes, especially given the role that the states and tribes will play in the bidding/selection process and the significant impact this will have on current program administration? What is the basis for OSM's proposal to essentially upend the carefully crafted legislative resolution related to future AML program funding and AML reclamation work approved by Congress in 2006? Has OSM thought and worked through the implications for AML program management and administration that would result from its legislative proposal?

Why has OSM chosen to advocate for a hardrock AML reclamation fee to be collected by OSM but not distributed by OSM? Why bring another federal agency (BLM) into the mix when OSM has the greater expertise in this area?

**Specific Questions re Cost Recovery/User Fees**

OSM has requested an amount for state Title V regulatory program grants in FY 2013 that reflects an \$11 million decrease from FY 2012. And while OSM does not dispute that the states are in need of an amount far greater than this, the agency has suggested once again that the states should be able to make up the difference between what OSM has budgeted and what states actually need by increasing cost recovery fees for services to the coal industry. What exactly will it take to accomplish this task?

Assuming the states take on this task, will amendments to their regulatory programs be required?

How long, in general, does it take OSM to approve a state program amendment?

The state of Alabama submitted a program amendment to OSM in May of 2010 to raise current permit fees and authorize new, additional fees. It took OSM a full year to approve this amendment, resulting in lost fees of over \$50,000 to the state. If OSM is unable to approve requested state program amendments for permit fee increases in less than a year, how does the agency expect to handle mandated permit increases for all of the primacy states within a single fiscal year?

If OSM is not expecting to pursue this initiative in fiscal year 2013, why include such a proposal in the budget until OSM has worked out all of the details with the states in the first instance?

Speaking of which, what types of complexities is OSM anticipating with its proposal at the state level? Many of the states have already indicated to OSM that it will be next to impossible to advance a fee increase proposal given the political and fiscal climate they are facing.

OSM's solution seems to be that the agency will propose a rule to require states to increase permit fees nationwide. Won't this still require state program amendments to effectuate the federal rule, as with all of OSM's rules? How does OSM envision accomplishing this if the states are unable to do it on their own?

Even if a federal rulemaking requiring permit fee increase nationwide were to succeed, how does OSM envision assuring that these fees are returned to the states? Will OSM retain a portion of these fees for administrative purposes?

#### **Specific Questions re Federal Program Increases**

In OSM's budget justification document, the agency also notes that the states permit and regulate 97 percent of the Nation's coal production and that OSM provides technical assistance, funding, training and technical tools to the states to support their programs. And yet OSM proposes in its budget to cut funding to the states by \$11 million while increasing OSM's own federal operations budget by nearly \$4 million and 25 FTEs. How does OSM reconcile these seemingly contradictory positions?

OSM's budget justification document points out in more detail why it believes additional federal resources will be needed based on its recent federal oversight actions during FY 2011, which included increased federal inspections. Was OSM not in fact able to accomplish this enhanced oversight with its current resources? If not, where were resources found wanting? How much of the strain on the agency's resources was actually due to the stream protection rulemaking and EIS process?

In light of recent annual oversight reports over the past five years which demonstrate high levels of state performance, what is the justification for OSM's enhanced oversight initiatives and hence its federal program increase?

Something has to give here—no doubt. There is only so much money that we can make available for the surface mining program under SMCRA. Both Congress and the courts have made it clear that the states are to exercise exclusive jurisdiction for the regulation of surface coal mining operations pursuant to the primacy regime under the law. It begs the questions of whether OSM has made the case for moving away from supporting the states and instead beefing up the federal program. Unless the agency can come up with a better, more detailed justification for this realignment of resources, how can Congress support its budget proposal?

#### **Specific Questions re OSM Oversight Initiative**

OSM has recently finalized a Ten-Day Notice directive (INE-35) that had previously been withdrawn in 2006 based on a decision by then Assistant Secretary of the Interior Rebecca Watson. The basis for terminating the previous directive was several court decisions that clarified the respective roles of state and federal governments pursuant to the primacy regime contained in SMCRA. The Secretary's decision also focused on the inappropriate and unauthorized use of Ten-Day Notices under SMCRA to second-guess state permitting decisions. OSM's new TDN directive flies in the face of both this Secretarial decision and federal court decisions. Does OSM have a new Secretarial decision on this matter? If not, how can its recent action overrule this prior decision? Has the Solicitor's office weighed in on this matter? If so, does OSM have an opinion supporting the agency's new TDN directive? Will OSM provide that to the Committee?

In light of limited funding for the implementation of SMCRA, how does OSM justify the state and federal expenses that will necessarily follow from reviewing and second-guessing state permitting decisions? States have complained that responding to a single OSM TDN, especially with respect to state permitting decisions, can require the investment of 2—3 FTE's for upwards of a week. How do you justify this?

#### **Questions and Concerns re the AML Legislative Proposal in OSM's FY 2013 Budget**

##### **The Proposed Competitive Allocation Process**

- What is the potential for this new review and ranking process to reduce expenditures and increase efficiency without being counter-productive? Will it introduce an additional level of bureaucracy and result in more time being spent formulating proposals and less on actual AML reclamation? The present funding formula, while not perfect, at least provides some direction on which to base long term strategic planning and efficient use of available funds. The closest analogy to what OSM is proposing by way of its competitive allocation process is the way BLM and the Forest Service currently allocate their AML funds through competitive proposals to various state offices and regions. Because of the uncertainties of funding, neither agency has been able to develop significant in-house expertise, but instead often rely on SMCRA-funded states like MT, NM, UT and CO to do a good portion of their AML work. Why would

OSM want to duplicate a system that has proven problematic for other agencies?

- Who would be the “other parties” potentially bidding on AML grant funds? Would this include federal agencies such as BLM, FS, NPS, etc? If so, in many cases, those agencies already rely on the states to conduct their reclamation work and also determine priorities based on state input or guidance.
- What do the state project managers and inspectors do if a state does not win a competitive bid for AML funds? How does a state gear up if it receives funding for more projects than it can handle with present staffing? Each state and tribe has different grant cycles. Unless all are brought into one uniform cycle, how will everyone compete for the same dollars? In this regard, how can the competitive allocation process and the use of the Advisory Council be more efficient and simple than what we already have in place?
- How long will OSM fund a state’s/tribe’s administrative costs if it does not successfully compete for a construction grant, even though the state/tribe has eligible high priority projects on AMLIS? How will OSM calculate administrative grant funding levels, especially since salaries and benefits for AML project managers and inspectors predominantly derive from construction funds? Would funding cover current staffing levels? If not, how will OSM determine the funding criteria for administrative program grants?
- How do the states and tribes handle emergency projects under the legislative proposal? Must these projects undergo review by the Advisory Council? Will there be special, expedited procedures? If a state/tribe has to cut back on staff, how does it manage emergencies when they arise? If emergency programs do compete for AML funds, considerable time and effort could be spent preparing these projects for review by the Advisory Council rather than abating the immediate hazard. Again, how can we be assured that emergencies will be addressed expeditiously?
- What ranking criteria will be used to determine the priority of submitted AML project grant requests? The number of people potentially affected? The current priority ranking on AMLIS? How would the Council determine whether a burning gob pile near a city presents a greater hazard than a surface mine near a highway or an underground mine beneath a residential area? Would the winning bid be the “most convincing” proposal? The one with the most signatures on a petition? The one with the most influential legislative delegation? Will AMLIS continue to serve as the primary mechanism for identifying sites and their priority status?
- If the current AML funding formula is scrapped, what amount will be paid out to the non-certified AML states and tribes over the remainder of the program? What does OSM mean by the term “remaining funds” in its proposal? Is it only the AML fees yet to be collected? What happens to the historic share balances in the Fund, including those that were supposed to be re-directed to the Fund based on an equivalent amount of funding being paid to certified states and tribes each year? Would the “remaining funds” include the unappropriated/prior balance amounts that have not yet been paid out over the seven-year installment period? What about the amounts due and owing to certified states and tribes that were phased in during FY 2009–2011?
- Has anyone alleged or confirmed that the states/tribes are NOT already addressing the highest priority sites for reclamation within the context of the current AML program structure under the 2006 Amendments? Where have the 2006 Amendments faltered in terms of high priority sites being addressed as envisioned by Congress? What would remain unchanged in the 2006 Amendments under OSM’s proposal?

#### **The Nature and Purpose of the Advisory Council**

- Who would be on the AML Advisory Council and how could they collectively have better decision-making knowledge about hazardous AML sites than the state and tribal project managers and administrators who work with these sites on a daily basis?
- What will be the criteria to serve on the Advisory Council? Will the Federal Advisory Committee Act (FACA) requirements apply to the formation and deliberations of the Council? How long does OSM envision it will take to establish the Council and when will it become operational?
- Will the Advisory Council be providing recommendations to OSM or will OSM make all final decisions? Will these decisions be appealable? If so, to who? Does OSM envision needing to develop internal guidance for its own review process? If so, how long will it potentially take from Advisory Council review



and recommendation to final OSM decision in order to complete the grant process so a state can begin a project?

- What degree of detail will be required in order to review and approve competitive grant applications? Will the Council review each project? What type of time constraints will be placed on their review?
- Will the Advisory Council consider partial grants for projects that may exceed the allocation for a single year? Would minimum program states be authorized to apply for a grant that would exceed \$3 million?
- Will grant applications be based on an individual project or will the grant be based on a project year? How will cost overruns be handled?

#### **Planning for AML Work**

- One of the greatest benefits of reauthorization under the 2006 Amendments to SMCRA was the predictability of funding through the end of the AML program. Because state and tribes were provided with hypothetical funding levels from OSM (which to date have proven to be quite accurate), long-term project planning, along with the establishment of appropriate staffing levels and project assignments, could be made more accurately and efficiently. How can states/tribes plan for future projects given the uncertainty associated with having to annually bid for AML funds? NEPA compliance issues alone can take years of planning. One state recently asked its State Historic Preservation Office for initial consultation regarding project sites that may be reclaimed over the next five years. This process will also have significant impacts on those states that utilize multi-year construction contracts that are paid for with annual AML grants.
- State and tribal AML projects are often planned 18 months to two years in advance of actually receiving construction funds, based on anticipated funding under the 2006 Amendments. During that time, states and tribes are performing environmental assessments, conducting archeology reviews, completing real estate work and doing NEPA analyses. There could be considerable effort and money wasted if a project does not get approved during the competitive allocation process.
- At what point does a State or Tribe seek approval from the advisory council? Considerable investigation must take place prior to developing most projects, whether they be acid mine drainage projects or health and safety projects. How much time should be spent in design prior to proceeding to the Council? How accurate must a cost estimate be prior to taking a project before the Council? The greater the accuracy, the greater the design time expended, possibly for a project that will be rejected.
- State and tribes often seek and obtain valuable matching funds from watershed groups, which take considerable lead time to acquire. It will be difficult to commit to partners if we don't know what level of funding, if any, will be made available from OSM.
- Several states have committed significant amounts of money to waterline projects across the coalfields. Local governmental entities have started designs and applied for additional funds from other agencies to match AML funds in order to make these projects a reality. Ending all AML funding for these projects (assuming they are not considered "high priority") could have significant consequences for local communities. Our understanding is that these projects were excluded under the 2006 Amendments from the priority scheme contained in section 403(a) of SMCRA.
- Does OSM's proposal allow acid mine drainage (AMD) projects to be undertaken? Can these be designated as high priority? (Our understanding is that those AMD projects undertaken pursuant to the "AMD set-aside program" are not subject to the priority scheme under Section 403(a) and that those AMD projects done "in conjunction with" a priority 1 or 2 project are considered "high priority".) How do states handle ongoing engineering, operating and maintenance costs for existing AMD treatment systems? As the Administration works diligently to develop a new rule to protect streams nationwide, why would it advance a proposal to essentially halt the cleanup of streams funded by the AML program?

#### **Overarching Concerns**

- Given the original design of SMCRA by its framers that AML funds will only be allocated to those states who agree to implement Title V regulatory programs for active mining operations, to what extent can we expect that states will continue to implement and fund their Title V programs if Title IV funding is drastically cut or eliminated under the proposal? Furthermore, since

states and tribes will not know what level of AML program staffing to maintain from year to year under the proposal, who would desire to work for a program that is in a constant state of flux?

- The SMCRA 2006 Amendments were the result of roughly ten years of negotiations, discussions, and debates in Congress. Since the legislative process to enact these new proposed changes could take years, why didn't OSM begin with the legislation and then follow up with an appropriate budget proposal? Why weren't the states/tribes or the NAAMLPL included in discussions that led to this legislative proposal?
- As OSM develops the legislative proposal for a competitive bidding process, the agency should consider the impacts on minimum programs and consider maintaining the minimum allocation of \$3 million for minimum program states.
- What type of state AML plan amendments does OSM foresee as a result of this new process?

#### **Proposed Elimination of Funding for AML Emergencies**

- While amendments to Title IV of SMCRA in 2006 (P.L. 109-432) adjusted several provisions of the Act, no changes were made to OSM's emergency powers in Section 410. Quite to the contrary, Section 402(g)(1)(D)(2) states that the Secretary shall ensure "strict compliance" with regard to the states' and tribes' use of non-emergency grant funds for the priorities listed in Section 403(a), none of which include emergencies. The funding for the emergency program comes from the Secretary's discretionary share, pursuant to Section 402(g)(3) of the Act. This share currently stands at \$416 million. OSM's elimination of funding for the emergency program will result in the shift of approximately \$20 million annually that will have to be absorbed by the states. This is money that cannot be spent on high priority AML work (as required by SMCRA) and will require the realignment of state AML program operations in terms of personnel, project design and development, and construction capabilities. In most cases, depending on the nature and extent of an emergency project, it could preclude a state's ability to undertake any other AML work during the grant year (and even following years), especially for minimum program states. How does OSM envision states and tribes being able to meet their statutory responsibility to address high priority AML sites in light of the elimination of federal funding for AML emergencies? How does OSM reconcile this proposal with the intentions of Congress expressed in the 2006 amendments to move more money out of the AML Fund sooner to address the backlog of AML problems that continue to linger?

#### **Proposed Elimination of Funding to Certified States and Tribes**

- From what we can ascertain, OSM proposes to eliminate all payments to certified states and tribes—in lieu of funds; prior balance replacement funds; and monies that are due and owing in FY 2018 and 2019 from the phase-in during fiscal years 2008 and 2009. Is this accurate? OSM says nothing of what the impact will be on non-certified states as a result of eliminating these payments to certified states and tribes—especially the equivalent payments that would otherwise be made to the historic production share that directly relate to "in lieu of" payments to certified states and tribes under section 411(h)(4). Previously, OSM has stated that "the amounts that would have been allocated to certified states and tribes under section 402(g)(1) of SMCRA will be transferred to the historical production allocation on an annual basis **to the extent that those states and tribes receive in lieu payments from the Treasury (through the Secretary of the Interior) under section 402(i) and 411(h)(2) of SMCRA.**" By OSM's own admission in its FY 2013 proposed budget, this will amount to \$1.2 billion over ten years. If the in lieu payments are not made (as proposed), how can the transfer to historic production occur? The result, of course, would be a drastic impact on the historic production allocation otherwise available to uncertified states. Will OSM address this matter in its proposed legislation? If so, how?
- Has OSM considered the fiscal and programmatic impacts that could result if the certified states and tribes, who no longer receive AML monies, choose to return their Title V regulatory programs to OSM (especially given the severe reductions being proposed for FY 2013 in Title V grants)?
- Finally, how do the cuts in the Title IV program line up with the Administration's other economic, fiscal and environmental objectives as articulated in the deficit reduction and jobs bills that have been considered by Congress? These objectives include environmental stewardship, cleaning up abandoned mines

(coal and noncoal) nationwide, creating green jobs, pumping dollars into local communities, putting money to work on the ground in an expeditious manner, sustainable development, infrastructure improvements, alternative energy projects, protecting public health and safety, and improving the environment. It seems to us that there is a serious disconnect here and we remain mystified as to how these laudable objectives and OSM's budget proposal can be reconciled.

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Mr. JOHNSON. Thank you, Mr. Conrad.  
Mr. Wasson, you may now begin.

**STATEMENT OF MATT WASSON, DIRECTOR OF PROGRAMS,  
APPALACHIAN VOICES**

Mr. WASSON. Thank you, Congressman Johnson, to the Committee, and to the staff, for the opportunity to speak about OSM's work and responsibility to protect people and the environment from mining practices that have demonstrably been poorly regulated in the past. My name is Matt Wasson, and I am the Director of Programs at Appalachian Voices. We are a non-profit environmental organization dedicated to addressing the greatest threats to the Southern and Central Appalachian Region.

I first want to address the development of the stream protection rule, and the air of misinformation and alarmism about the rule's purported threats to jobs, domestic energy production, and the economy.

Make no mistake that the controversy over OSM's actions on the stream protection rule is all about mountaintop removal, a mining practice in Appalachia that involves blasting the tops off of mountains to access coal, and dumping the resulting waste and debris down into valleys below.

Last year, the discussion draft of the Environmental Impact Statement that was leaked to coal company employees and the media provided mountaintop removal supporters like the National Mining Association with the opportunity to spread fear and misinformation, suggesting that the rule would all but abolish mining, and especially in Western surface mining areas, as well as in terms of underground longwall mining in the East.

To demonstrate just how disconnected this rhetoric has been from reality, if you actually look at the document that was leaked, for what it is worth, the three most restrictive alternatives they put out were predicted to actually increase underground coal mining in the East. And I am guessing that this important fact has not been brought up by coal industry witnesses in this Committee.

But the most important thing I want to impress on this Committee is how much is at stake for people whose health, homes, communities are at risk from poorly regulated mining practices in Appalachia and beyond. Recently, 18 different studies published in peer-reviewed scientific journals and authored by nearly 40 different researchers have demonstrated pervasive impacts on the health, well-being, and life expectancy of people living near mountaintop removal and other types of coal mines in Appalachia.

Last year, the overwhelming evidence that coal mining was leading to a public health crisis in the coal-bearing regions of their State led the Kentucky Medical Association to pass a resolution pledging support for laws, rules, and regulations to protect people's

health from the impacts of coal. As reasons for adopting the policy, the KMA made the following statements—and I quote—“Loss of stream integrity from valley fills associated with mountaintop removal coal mining is related to increased cancer mortality.” And they cite elevated birth defect rates in mountaintop removal areas of Central Appalachia compared with other mining areas and non-mining areas.

The result of all of these health impacts is that life expectancy for both men and women actually declined between 1997 and 2007 in Appalachian counties with the most strip mining. In 2007, life expectancy in these counties was comparable to that in developing countries like Iran, Syria, El Salvador, and Vietnam.

I last want to address some of the false assumptions being made about the impact of OSM’s rulemaking on jobs, domestic energy production, and the economy. Supporters of mountaintop removal mining have been issuing sky-is-falling predictions ever since the EPA announced its plans to give greater scrutiny to mountaintop removal mine permits in March of 2009. This gives us since then three years to evaluate the quality of those predictions.

As it turns out, those predictions that the Administration’s actions would destroy jobs and put America’s energy supply at risk failed to occur. The number of mining jobs in Appalachia has increased substantially since 2009. Employment in this last quarter was up six percent since the Administration first announced its new mountaintop removal permitting policies. It is up 9 percent since the EPA issued a new guidance on surface mine permitting in April of 2010. 2011 saw the highest level of employment in Appalachian coal mines in 15 years.

And, in terms of domestic energy production, according to the Federal Reserve, the productive capacity of actively producing coal mines in the U.S. in 2011 is the highest it has ever been in the 26 years they have been keeping those data. And the utilization of that capacity is the lowest it has been over that time frame, largely because of competition from natural gas.

The problem facing the coal industry is low gas prices. It is not permitting. And I encourage this Committee to use its power to help end mountaintop removal, and create a just a sustainable future for the people of Appalachia.

Thank you for the opportunity.

[The prepared statement of Mr. Wasson follows:]

**Statement of Matthew F. Wasson, Ph.D., Director of Programs,  
Appalachian Voices**

Thank you Chairman Lamborn and members of the Subcommittee for the opportunity to speak about the need for OSM to implement an effective Stream Protection Rule. I also appreciate the opportunity to counter the alarmist misinformation that has surrounded the debate about the SPR in regard to the rule’s purported threats to jobs and the economy.

My name is Matt Wasson and I am the Director of Programs at Appalachian Voices, a non-profit organization dedicated to addressing the greatest environmental threats to the Southern and Central Appalachian Region. Appalachian Voices is a member of the Alliance for Appalachia, which is an alliance of 13 grassroots organizations working to end mountaintop removal coal mining and bring a just and sustainable future to Central Appalachia.

Beginning with my doctoral research at Cornell University on the impacts of acid rain on birds, I have spent the last 17 years involved in research on the mining, processing and combustion of coal. Despite my extensive research on stream ecology

and coal, I can't offer the subcommittee the type of testimony that would be most salient to the topic of today's hearing—the tragic personal stories of what it is like to bathe your children in polluted water or to wake up one day to find your tap water looks like tomato soup and smells like rotten eggs. But through my work with the Alliance for Appalachia I have had the privilege of working with many people who have experienced precisely those circumstances. On their behalf, I will try to provide my best summary of the myriad and devastating impacts that poorly regulated coal mining can have on nearby families and communities.

The most damaging form of poorly regulated coal mining is mountaintop removal, a technique that involves blasting off the tops off mountains to access thin seams of coal and then generally dumping the waste and debris into nearby valleys. Not only has this practice obliterated more than 500 of the oldest and most biologically diverse mountains on the continent, but it has buried more than 2,000 miles of streams and polluted the headwaters of the drinking water supply of millions of Americans.

More importantly, 18 peer-reviewed scientific studies have linked mountaintop removal and other forms of coal mining to a host of medical conditions including increased rates of birth defects, cancer and cardiovascular disease in nearby communities, resulting in life expectancies comparable to those in developing countries like Syria, Iran and Viet Nam.

Despite what you may have heard, the controversy over the Stream Protection Rule is all about mountaintop removal. The atmosphere of confusion, misinformation and near hysteria surrounding OSM's development of that rule was initiated and fueled by those with a vested interest in continuing and even expanding the practice.

As the chairman and members of this committee know well, an early discussion draft of the environmental impact statement for the Stream Protection Rule was leaked to coal company employees and the media just over a year ago. While mountaintop removal supporters quickly took advantage of the opportunity to spread fear and misinformation about the rule (i.e., asserting that it would abolish western surface mining and longwall mining in the East), the actual content of the leaked EIS provides no indication that OSM has any such intentions. To provide some perspective, the three most restrictive regulatory alternatives evaluated in the draft EIS were predicted to lead to increased underground coal mining in the East, while the fourth alternative would have no impact. I would guess that this fact has not been brought up by coal industry witnesses in this committee.

Like most advocates for a strong Stream Protection Rule, I recognize that America needs coal to power our homes, factories and economy. Moreover, we will continue to rely on the hard work and sacrifice of American miners to supply coal for years, perhaps decades, into the future. While demand for coal is in long-term decline due to competition from other energy sources, there is no immediate alternative that can replace the 42% of our electricity and 20% of our overall energy supply that coal currently provides. The best way to ensure a reliable supply of coal, as well as to honor the men and women that mine it, is to give agencies the authority and resources they need to ensure coal is mined in a manner that does not destroy the land, water and health of nearby residents and that clearly complies with laws passed by Congress to protect our natural resources.

On behalf of the thousands of people whose health, homes and communities are at risk from poorly regulated mining practices in Appalachia and beyond, I implore the members of this committee to allow OSM to do its job to promulgate common sense rules that will protect the people and mountains of Appalachia as well as the streams that are the headwaters of the drinking water supply of millions of Americans.

### **Why a Strong Stream Protection Rule is Necessary**

#### *Environmental Considerations*

The fact that surface coal mining, and mountaintop removal mining in particular, is causing massive and irreversible impacts to Appalachian streams is beyond question. According to a groundbreaking study published by 13 leading aquatic ecologists in 2010 in *Science*, the nation's premier scientific journal:

"Our analyses of current peer-reviewed studies and of new water-quality data from WV streams revealed serious environmental impacts that mitigation practices cannot successfully address. Published studies also show a high potential for human health impacts... Clearly, current attempts to regulate [mountaintop removal mining] practices are inadequate. Mining permits are being issued despite the preponderance of scientific evidence that impacts are pervasive and irreversible and that mitigation cannot compensate for losses."

In addition to the impact on streams, mountaintop removal has obliterated 500 of the oldest mountains on the continent and caused widespread destruction and fragmentation of Appalachian forests. According to the 2010 Science article, “The extensive tracts of deciduous forests destroyed by [mountaintop removal] support some of the highest biodiversity in North America, including several endangered species.”

#### *Impacts on the Health and Well-Being of People*

There’s a common saying in Appalachia: what we do to the land, we do to the people. A host of recent peer-reviewed scientific studies have demonstrated the truth of these words. Evidence of pervasive impacts on the health, well-being and life-expectancy of people living near mountaintop removal and other types of coal mines in Appalachia has been published over the last five years in 18 different scientific studies authored by nearly 40 different researchers. This overwhelming evidence led the Kentucky Medical Association to pass a resolution in 2011 pledging to “educate the public and make publicly visible its support for national and state laws, rules and regulations that protect individual health and public health from the impact of the extraction, transportation, processing and combustion of coal.” As reasons for adopting the policy, the KMA made the following statements

- “A recent study found that the loss of stream integrity from valley fills associated with mountaintop removal (MTR) coal mining is related to increased cancer mortality;”
- “A recent study found elevated birth defect rates in MTR areas of central Appalachia compared with other coal mining areas and non-mining areas;”
- “MTR areas are also associated with the greatest reductions in health-related quality of life even when compared with counties with other forms of coal mining;”
- “Considering the value of life lost, a 2009 study concluded that the human cost of the Appalachian coal mining economy outweighs its economic benefits.”

In addition to the health impacts cited by the Kentucky Medical Association, recently published studies have associated mountaintop removal and other forms of coal mining in Appalachia with increased rates of:

- Chronic respiratory and kidney disease,
- Low birth weight,
- Deaths from cardiopulmonary disease,
- Hypertension,
- Lung cancer,
- Hospitalizations
- Unhealthy days (poor physical or mental health or activity limitation)

The net result of these health impacts is illustrated in an analysis of data published by the Institute for Health Metrics and Evaluation in 2011. Life expectancy for both men and women actually declined between 1997 and 2007 in Appalachian counties with the most strip mining, even as life expectancy in the U.S. as a whole increased by more than a year. In 2007, life expectancy in the five Appalachian counties with the most strip mining was comparable to that in developing countries like Iran, Syria, El Salvador and Viet Nam.

### **Status and Trends in Life Expectancy among the Five Appalachian Counties with the Most Strip Mining**

| <b>County</b>       | <b>Male life expectancy in 2007<br/>(and change since 1997)</b> | <b>Female life expectancy in 2007<br/>(and change since 1997)</b> |
|---------------------|---|---|
| Boone, WV           | <b>69.9 years (-0.8)</b>  | <b>76.7 years (-1.5)</b>  |
| Perry, KY           | <b>68.4 years (-1.5)</b>  | <b>76.6 years (-0.5)</b>  |
| Logan, WV           | <b>68.9 years (-0.8)</b>  | <b>76.4 years (-0.8)</b>  |
| Pike, KY            | <b>68.7 years (-0.9)</b>  | <b>76.3 years (-0.9)</b>  |
| Mingo, WV           | <b>68.7 years (-0.4)</b>  | <b>75.9 years (-0.8)</b>  |
| <b>U.S. Average</b> | <b>74.2 years (+1.5)</b>  | <b>79.7 years (+0.5)</b>  |

Source: Institute for Health Metrics and Evaluation (IHME). Adult Life Expectancy by US Count 1987-2007. Seattle, United States, 2011.

Mountaintop removal coal mining is also associated with poor emotional health. In surveys conducted by Gallup in 2010 across all 435 Congressional districts, those where mountaintop removal occurs ranked dead last in both physical and emotional well-being.

**The Three Congressional Districts where Most Mountaintop Removal Mining Occurs Ranked Last in Physical and Emotional Well-Being According to the Gallup-Healthways 2010 Rankings of 435 Congressional Districts and the District of Columbia**

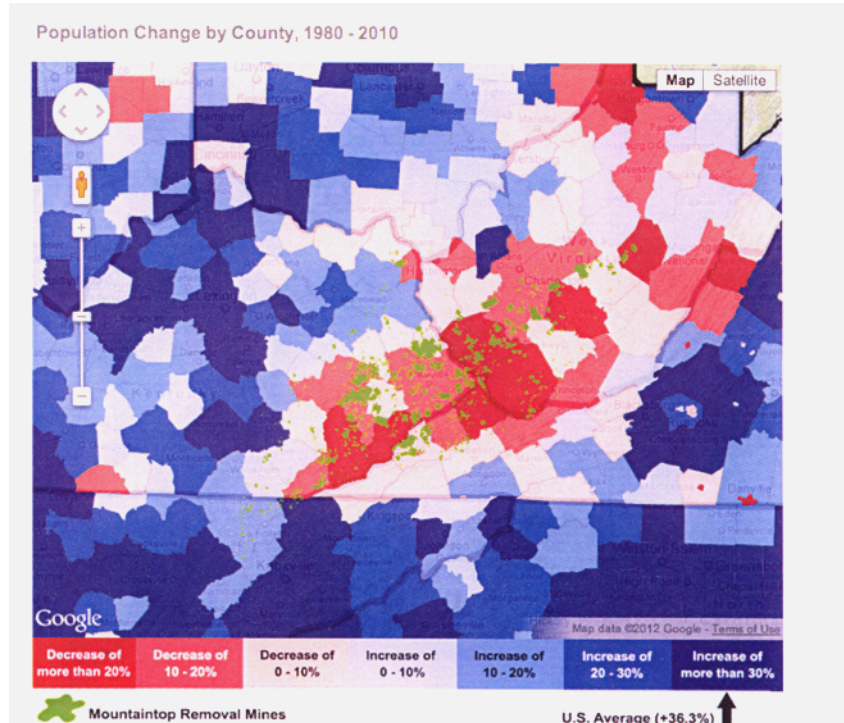
|                         | KY-05      | WV-03      | VA-09      |
|-------------------------|------------|------------|------------|
| <b>Emotional Health</b> | <b>436</b> | <b>435</b> | <b>434</b> |
| <b>Physical Health</b>  | <b>436</b> | <b>435</b> | <b>434</b> |
| <b>Overall Rank</b>     | <b>435</b> | <b>432</b> | <b>431</b> |

*Source: Gallup-Healthways Well-Being Index, 2010: City, State and Congressional District Well-Being Reports; [www.well-beingindex.com](http://www.well-beingindex.com)*

Given that mountaintop removal frequently forces Appalachians to leave homes and land that have been in their family for as many as five, six, or seven generations, severe impacts on emotional well-being are not surprising—it's not just mountains, streams, or even homes that are at stake, it's people's culture, identity and sense of place. These factors could also help explain the dramatic declines in population that have occurred over the past 30 years in counties where mountaintop removal occurs. The correlation between mountaintop removal mining and population declines is unmistakable in the map of county population trends between 1980 and 2010 shown below.

Beyond its association with poor physical and emotional health, mountaintop removal is associated just as strongly with poor socioeconomic conditions. Not only do the Central Appalachian counties where mountaintop removal occurs have among the highest poverty rates in the country, but a study of "persistent economic distress" published by the Appalachian Regional Commission in 2005 showed that those counties are far more likely to remain economically distressed compared to nearby counties where mining is less prevalent. According to the ARC study:

"Of all the regions in this analysis, Central Appalachia has been one of the poorest performers in relation to the ARC's economic distress measure over time. Furthermore, and unlike all other regions in the U.S., current and persistent economic distress within the Central Appalachian Region has been associated with employment in the mining industry, particularly coal mining."



Ironically, the high poverty rates in Appalachian counties are frequently cited as reasons for streamlining the permitting of mountaintop removal mines, despite the fact that more than 50 years of poorly regulated strip mining has failed to improve the economic situation. A study published in 2011 in the *Annals of the Association of American Geographers* took on the question of the relationship between mountaintop removal and unemployment rates directly. Based on their analysis, the authors of the study concluded:

“Although policymakers are aware of the negative environmental effects of MTR, its continued use is primarily rationalized using the argument that it contributes to local economies, especially job retention and development...

Contrary to pro-MTR arguments, we found no supporting evidence suggesting MTR contributed positively to nearby communities’ employment.”

To make matters worse, a series of new studies that quantify coal-related revenues and expenditures to state treasuries have shown that the coal industries in West Virginia, Kentucky and Tennessee operate at a net loss to tax-payers, even accounting for the indirect impacts of coal mine employment while ignoring the “externalized costs” of the industry on the health and environment of communities where coal is mined. According to the West Virginia study:

“While every job and every dollar of revenue generated by the coal industry provides an economic benefit for the state of West Virginia and the counties where the coal is produced, the net impact of the West Virginia coal industry, when taking all revenues and expenditures into account, amounted to a net cost to the state of \$97.5 million in Fiscal Year 2009.”

One might wonder why, with all of the evidence that mountaintop removal has detrimental impacts on the health and well-being of nearby residents, the practice continues to occur and is supported by virtually every elected representative of the region to state and Congressional offices. The question becomes even more puzzling when one looks at recent polls showing that likely voters in Central Appalachian coal counties oppose the practice and, by an overwhelming margin, oppose the destruction and pollution of streams that results from mountaintop removal coal mining. According to a recent poll conducted by Lake Research Partners and Bellweather Research, “Voters across Kentucky, West Virginia, Tennessee, and Vir-



ginia solidly oppose mountaintop removal coal mining, by wide margins and across a host of demographic and political divides.” The poll also found that:

- “Three-quarters support fully enforcing—and even increasing protections in—the Clean Water Act to safeguard streams, rivers, and lakes in their states from mountaintop removal coal mining... Just 8% of voters oppose it.”
- “...fully 57% oppose mountaintop removal and with noticeable intensity (42% strongly oppose), compared to just 20% who support it (10% strongly).”
- “solid majorities of voters in these Appalachian states believe either that “environmental protections are often good for the economy” (40%) or “have little or no impact on the economy” (20%). Just one-quarter of voters (25%) believes that “environmental protections are often bad for the economy”.”

#### **How Will the Stream Protection Rule impact Jobs, Domestic Energy Production and the Price of Electricity?**

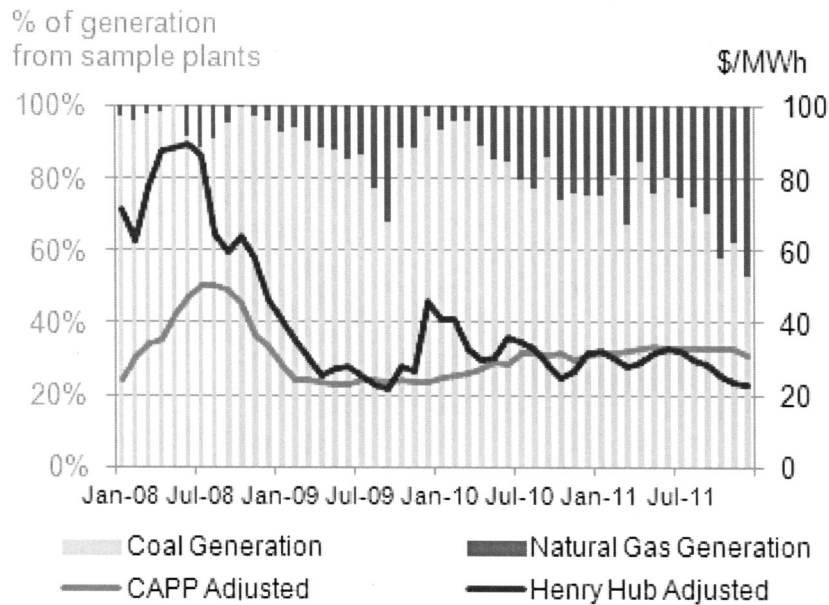
Supporters of mountaintop removal mining like the National Mining Association have been issuing sky-is-falling predictions of devastating impacts on jobs and national security ever since the EPA announced its plans to give greater scrutiny to mountaintop removal mine permits in March of 2009. The industry sounded similar warnings when the memorandum of understanding was signed by EPA, OSM and the Army Corps of Engineers in June, 2009, and when EPA released a new guidance for reviewing Clean Water Act permits for Appalachian surface mines in April, 2010.

With three years of coal production and employment data now available since enhanced EPA oversight of mine permitting began, the validity of those predictions can be put to the test. Testing these claims should also shed some light on the validity and integrity of predictions now being made by those same companies and trade associations in regard to the Stream Protection Rule.

As it turns out, the prediction that EPA’s actions would destroy jobs, increase electricity rates and put America’s energy supply at risk not only failed to occur, but was precisely the opposite of what actually occurred. The discrepancy between coal industry predictions and reality is probably attributable to the fact that every statement and analysis that has been made by mountaintop removal supporters about the impact of more stringent mine permitting has been predicated on one common false assumption: that permits are the limiting factor for coal production and that simply permitting and developing new coal mines will increase overall production and employment. In reality, declining demand for coal is the bottleneck for production.

What coal industry representatives have consistently glossed over is the fact that demand for coal is declining across most of the U.S. for the simple reason that it is unable to compete with alternative sources of electricity generation. A story published by the Energy Information Administration in its Feb 29th edition of the “Electricity Monthly Update” provides a concise illustration of the point. The story is about how three natural gas plants in Ohio are supplying an increasing proportion of the state’s electricity at the expense of seven older coal-fired plants that rely on Central Appalachian coal. According to the EIA:

“The increased generation from these three [gas-fired] plants is coming at the expense of less efficient coal plants. Seven coal plants in Ohio (with a combined capacity of 7,113 megawatts and an average heat rate around 10,500 Btu/kWh) have experienced a significant drop in generation in recent years. In the chart below, the generation share of these seven sample coal plants, expressed as its share of total generation from both sample coal and natural gas plants, is compared to the corresponding share of the three combined cycle plants. As illustrated in the chart, natural gas generation went from 3 percent of total sample plant generation in January 2008 to 47 percent in December 2011.



Source: U.S. Energy Information Administration

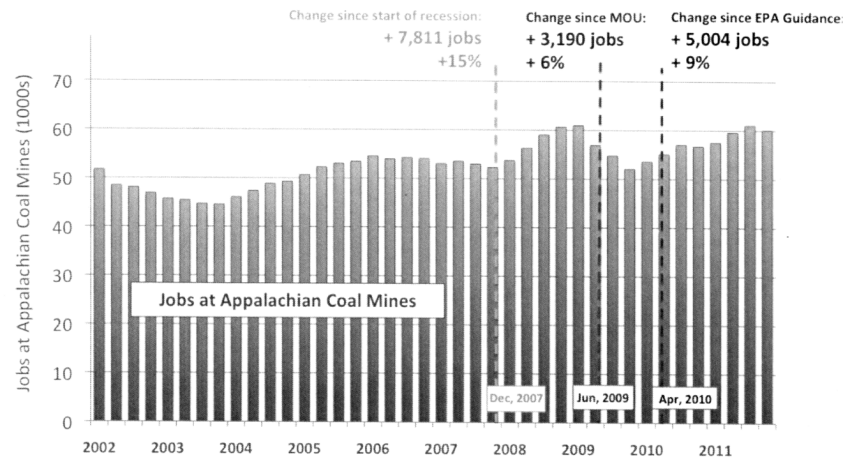
“As shown with the lines on the chart, relative Henry Hub and Central Appalachian coal prices appear to have a significant role in these gas-fired power plants being dispatched more often. The fuel prices have been adjusted to account for the average heat rate of natural gas or coal plants consuming that fuel in Ohio.”

A similar story could be told in states all across the eastern U.S. that have traditionally relied on Appalachian coal. Across the region, natural gas prices have fallen below the level where Appalachian coal can compete. Moreover, the declining role of coal in U.S. electricity markets is not the result of any new regulations, but is the continuation of a decades-long trend that began in the mid 80s, when coal supplied nearly 60% of U.S. electricity and is expected to continue at least through 2015, when EIA projects in its 2012 Annual Energy Outlook that coal will account for just 39% of U.S. generation.

#### *No impact of previous EPA and OSM actions on jobs*

In contrast to the dire predictions from mountaintop removal supporters, the number of mining jobs in Appalachia has increased substantially since 2009. In fact, 2011 saw the highest level of employment at Appalachian coal mines since 1997. Employment in the 4th quarter of 2011 was up 6% since the MOU was signed in June, 2009, and it was up 9% since EPA issued a new guidance on surface mine permitting in April, 2010 (see chart on next page).

**Appalachian mining jobs in 2011 were at their highest level since 1997 and have increased since EPA began enhanced scrutiny of mountaintop removal permits**



Source: MSHA Quarterly "Part 50: Address/Unemployment" data files, 2002-2011. Analysis by Appalachian Voices, March 2012

Of course, if demand for Appalachian coal continues on its expected downward trajectory then the number of jobs will ultimately decline as well. In fact, it appears that may already be occurring, as the enormous surge in international demand for metallurgical coal that began in 2009, which partially compensated for the sharp drop in demand for thermal coal from domestic power producers, has begun to fall off. As a result, Appalachian coal production is down 8% compared to the first quarter of 2011 and an increasing number of layoffs have occurred recently due to companies' decisions to idle or curtail production at certain mines. The fact that these layoffs are the result of falling demand, as opposed to difficulty in obtaining mining permits, is demonstrated by a press release issued by Alpha Natural Resources in February announcing their intention to idle six Appalachian mines and reduce production at four others. Alpha's CEO Kevin Crutchfield explained in the press release that "Several mines are encountering weak demand for their products," and that "... adverse market conditions left us no choice."

The press release goes on to explain that "Alpha's Central Appalachian businesses are seeing more electric utilities switch from thermal coal to natural gas to take advantage of gas prices at 10-year lows." The company also attributes some of the drop in demand to the fact that utilities are "shutting down a number of generating stations that have traditionally run on coals sourced from Central Appalachia." Unsurprisingly, the

*No impact of previous EPA and OSM actions on energy supply and electricity prices*

According to the Federal Reserve, the productive capacity of actively producing coal mines in the U.S. in 2011 was the highest it has ever been since they began supplying such estimates in 1986. The Fed estimates that productive capacity increased by 1.6% since 2009, when more stringent review of Appalachian mine permits began. The Federal Reserve data also show that the utilization of the productive capacity of active U.S. coal mines was an anemic 77% in 2011—the lowest it's been since the Fed began supplying such estimates. The capacity utilization of U.S. mines has averaged 85% since 1986.

To put those numbers in perspective, mines that have already been permitted could have produced an additional 138 million tons in 2011 if they were operating at the historic average level of capacity utilization. Notably, that is somewhat more than the 119 million tons produced by all strip mines in Appalachia combined. There could be no clearer evidence that the reason U.S. mines are operating at such a low capacity is because there is insufficient demand for the coal they could produce, and has nothing to do with difficulties companies might face in obtaining new permits for mountaintop removal mines.

Finally, an update on natural gas supplies in the Federal Energy Regulatory Commission's recent "Winter Market Assessment" highlights the absurdity of any contention that permitting requirements for mountaintop removal coal mines threaten national security and domestic energy supply. In their report, FERC makes clear that natural gas supplies are likely to remain more than adequate for two reasons: the rapid increase in unconventional gas drilling in the Marcellus Shale and the enormous increase in domestic oil drilling resulting from high oil prices. According to FERC:

"Natural gas production continued to grow in 2011, setting records throughout the year ... Shale gas now accounts for more than 25% of U.S. production, up from 5% in 2007. There has also been an increase in production of associated gas from oil shale wells, as high oil prices led to the acceleration in drilling for shale oil... In some regions, the rush to extract oil from oil rich shale formations has also resulted in high levels of flaring, or burning of natural gas. In the Bakken shale formation in North Dakota, for example, the natural gas gathering system is struggling to keep pace with growing production, and an estimated 25% of the natural gas produced, as much as 100 MMcfd, has been flared this year."

In regard to electricity rates, the average retail cost of electricity across the U.S. has increased by 1.7% since 2009, when the MOU on mountaintop removal went into effect. That translates into an annual rate of increase of less than 1%—below the rate of inflation. More importantly, the price of electricity in the South Atlantic—the region where most Central Appalachian coal is consumed—has actually fallen by 0.6% since 2009.

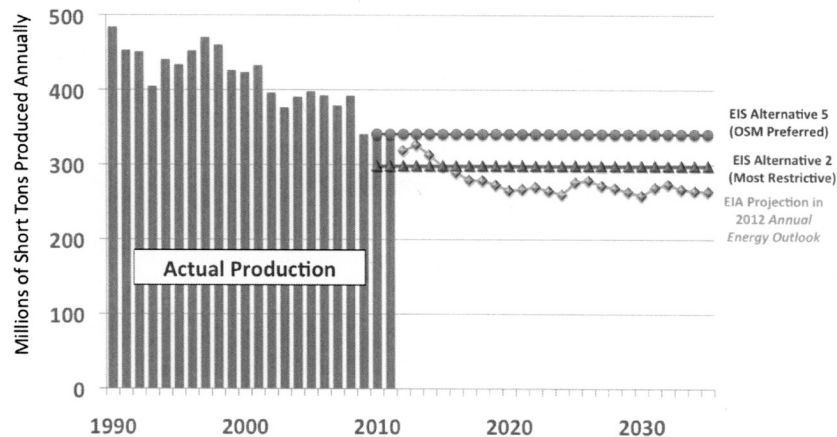
*Predictions of the impact of the Stream Protection Rule are based on faulty assumptions and non-existent data*

The most important thing to understand about any prediction of economic impacts of the Stream Protection rule is that, at this point, there is simply nothing valid to base those predictions on. OSM hasn't even proposed a draft rule. In the meantime, studies based on unrealistic assumptions and worst-case scenarios only serve to obfuscate the important issues the rule is designed to address.

Some studies claim to be based on an early version of the draft EIS for the rule that was leaked to coal companies and the media last year. The EIS analyzed 5 different alternatives that included "no action" (Alternative 1), three regulatory approaches presented in descending order of their relative impact on current mining practices (Alternatives 2,3 and 4), and a hybrid that was identified as OSM's preferred approach (Alternative 5). Even assuming that these alternatives are representative of OSM's current thinking, however, the analyses released by industry groups have no relationship to the actual content of the document that was leaked and appear to be based on data that was simply made up.

Even the original analysis conducted by the contractors that produced the draft EIS was problematic, as it was based on demonstrably unrealistic assumptions of coal demand. For instance, the headline in the media—that 7,000 jobs in Appalachia are projected to be lost if OSM's "preferred alternative" were implemented—was based on the assumption that demand for Appalachian coal would remain roughly constant at 2008 levels. As a result, the production levels at Appalachian mines that were forecast under all five regulatory scenarios were higher than what the Energy Information Administration is forecasting in its 2012 Annual Energy Outlook (see figure below).

**Projected Appalachian Coal Production under both the Most Restrictive and the Preferred Alternatives in OSM's Leaked EIS are Higher than EIA Forecasts for the Region through 2035**



In other words, if the same analysis were applied to more realistic levels of coal demand it would presumably predict there would be no reduction in Appalachian coal production and employment under any of the alternative rules considered in the EIS.

### Conclusion

Starving the agency of the funds it needs to promulgate the Stream Protection Rule would be irresponsible and it would be unethical given the enormous amount of evidence in recent peer-reviewed scientific literature showing that poorly regulated mining is causing irreparable damage to streams that are the headwaters of the drinking water supply of millions of Americans, and is the key factor implicated in what amounts to a public health crisis in Appalachia.

In terms of EPA's and OSM's actions around mountaintop removal, many environmental and Appalachian community advocates are also concerned about the approach these agencies are taking, but for very different reasons than those of the coal industry representatives that have testified repeatedly to this committee. I believe that EPA and OSM have erred in vainly pursuing a coherent approach to regulating mountaintop removal coal mining because mountaintop removal simply can't be done in a manner that complies with the Clean Water Act, much less that protects the health and welfare of people living nearby. Mountaintop removal doesn't need to be regulated, it needs to be ended. Even if there were an economic justification for neglecting clean water safeguards and the welfare of the Appalachian people, every rationale that has been put forward to continue mountaintop removal is contradicted by readily available facts which I have provided throughout this testimony.

I thank the committee and Chairman Lamborn again for the opportunity to speak on behalf of the thousands of people suffering from the impacts of poorly regulated coal mining practices. I sincerely hope that my testimony will help this committee better understand the pressing need for OSM to develop an effective set of rules to ensure that coal mining can continue to supply our country with much needed energy without the devastating impacts to public health, the environment and the economy of the regions where coal is mined.

Mr. JOHNSON. Thank you, Mr. Wasson. We will now begin questioning. Members are limited to five minutes for their questions, but we may have additional rounds, time permitting. I now recognize myself for five minutes.

Mr. Wasson, you did not provide references for the studies that you referred to. Do you have references that you can provide to this Committee?

Mr. WASSON. I do, and I would be happy to furnish those.

Mr. JOHNSON. OK. If you would furnish those, I would appreciate it.

You testified that you and your organization's goal is working to end mountaintop removal coal mining. Is that a correct statement?

Mr. WASSON. That is correct.

Mr. JOHNSON. OK. Well, clearly, as the invited witness of the Minority, it is clear that the Minority members of the Committee—by the way, who are all present here today we see, they are so interested in this important topic—it is clear that the Minority members of the Committee share this goal as well: Working to end mountaintop coal mining in America.

Former Chairman, Nick Rahall, frequently stated that SMCRA was written to establish guidelines for mining to permit the development of the resource and the protection of worker safety, at the same time understanding the environmental impacts and promoting reclamation of these areas. Clearly, Democrats on this Committee no longer believe in this premise.

If you want to talk about costing tens of thousands of direct and indirect coal jobs, and causing electricity rates to go higher, then we should go forward with that goal. Unfortunately, since President Obama has taken office, Americans are paying \$300 more per year in electricity rates.

And I might point out you gave all of these stats, Mr. Wasson, about coal production increases and coal production utilization. I have a hard time drawing a connection, then, with the dichotomy of the 150 or so people in my community at the Muskingum coal-fired power plants as a result of many of the utility companies closing down their coal-fired power plants.

If we go forward with this radical rewrite of the stream buffer zone rule, then that number, that \$300 per year, will only increase. It is a simple supply and demand issue. If you cut down the amount of coal we produce, then the cost of coal will increase, leading to higher utility rates.

Furthermore, in Mr. Wasson's testimony he stated that the preferred rule of OSM would not impact Western States or underground coal mining. That is simply not true. The preferred rule of OSM would cut down on underground coal mining by as much as 50 percent, and cost tens of thousands of direct and indirect jobs, if it goes forward.

I would also like to enter into the record a recent study by four Ph.D.'s at Yale University, and that was peer-reviewed by the scientific community, that concluded, among other things, coal mining is not, per se, an independent risk factor for increased mortality in Appalachia.

Finally, I would like to remind everyone that this is a budget hearing on OSM, and their use of taxpayer money to, amongst other things, unnecessarily rewrite a rule to forward a political agenda, regardless of the amount of jobs it would cost.

With that, I yield back my time. And seeing no Minority Members, I yield to my colleague, Mr. Thompson.

Mr. THOMPSON. Thank you, Mr. Johnson. I appreciate that. I thank the panel for coming and being a part of this important discussion.

Ms. Roanhorse, you raised your objections to OSM's proposal to eliminate unrestricted funds for certified States. How might this impact overall reclamation efforts and coal mining regulations, as a whole?

Ms. ROANHORSE. It will definitely impact our funding. We don't have other funding sources available, for example, for the Navajo Nation. We only get Federal funds from AML. We would not have any funds to do the reclamation of abandoned coal and abandoned uranium mine sites.

We do continue to find new sites in our areas. We do have a large area, and we have to do all the work that is necessary to do the planning, and also to—just to finish the work, to do reclamation.

And the uranium sites, we still have to revisit about 520 sites because of major environmental problems in those areas. In the meantime, we have to monitor those areas because of major erosion problems.

And we also do fund, with the little funds that we get, we do fund community projects. These projects are impacted by mining activities. It is under section 411 of SMCRA. It allows us to do project funding, more leverage funding for these projects. We have great need for that. We lack about 50 percent overall with the Navajo Nation. A lot of folks in the remote areas do not even have running water, do not have utilities, don't even have communication lines or paved roads.

And with whatever we receive, although it is limited, we do provide leverage funding for those projects. And all the other States, that would also impact their AML program, as well, especially all the abandoned non-coal sites. That funding is needed for the States.

Mr. THOMPSON. You had discussed in your testimony the possibility of States and Tribes having obtained NPDES permits for reclamation projects, as a result of the fourth circuit. Can you elaborate on this?

Ms. ROANHORSE. I will have Greg here respond to the question.

Mr. THOMPSON. OK, thank you.

Mr. CONRAD. Congressman, if you don't mind.

Mr. THOMPSON. Please.

Mr. CONRAD. The fourth circuit decision was primarily focused on bond forfeiture sites in the State of West Virginia. But the decision was structured so broadly that there is concern that the fourth circuit's decision, which does require NPDES permits for States that are doing bond forfeiture work, could extend to States that are doing abandoned mine land reclamation work. And for that reason we have had a concern about just how broadly that decision might reach into our work for AML.

Mr. THOMPSON. Well, Mr. Conrad, you made the point that OSM's "solution to the drastic cuts for state regulatory programs comes in the way of an unrealistic assumption of user fee increases." Can you elaborate on that point?

Mr. CONRAD. Yes, thank you. The idea behind this proposal from OSM is that the States would increase permit fees that we charge to the industry, and that those permit fees should be structured to capture all of the costs associated not only with permitting mining sites, but also for inspection and enforcement.

These would be substantial fees, and substantial fee increases that would be faced by the States. Our assessment, based upon our discussions with the States, is that the concept of fees is not particularly well received in most of the state legislatures at this point in time, and that to move in that direction would be exceedingly difficult. There is also a question about how those fees should be structured, whether we could do that with our own statutory authorities, or whether this would require a Federal rule to support and allow us to even move forward with these kinds of increases in the States.

So, it is an inherently complex and intricate process, certainly not something that could happen in the course of a single fiscal year.

Mr. THOMPSON. Mr. Conrad, how specifically can Congress or OSM improve and make more efficient the grant process and obligation of funding for reclamation purposes?

Mr. CONRAD. Certainly not by using or utilizing an advisory committee, as has been suggested in the legislative proposal.

Frankly, we believe that the process that we currently have in place works well, and that it is an efficient and an effective process. We don't see a need to completely retool and reorder that process. To the extent that we need to make any enhancements to that process, it would likely be in the area of pursuing the way that the States are currently working in the context of some of their partnerships, so that we can effectuate greater degrees of money that might be available to us in the AML world. But going in the direction of the legislative proposal, in our view, would be disastrous.

Mr. THOMPSON. Well, thank you, Mr. Conrad. Mr. Chairman, if I had any time remaining, I would yield it to the Members of the Minority Party to weigh in on this important topic that we have been addressing here, but I have neither time nor Democratic colleagues present. So thank you.

Mr. JOHNSON. Thank you, Mr. Thompson. I appreciate you yielding back.

I want to thank the panel for being here today, as well. I have to excuse myself, because I have a Subcommittee that I have to chair at noon. And so I am going to turn the gavel over to Mr. Thompson. You have no further questions?

OK. Well, in that case, then, thank you all for being here today, and providing your testimony. Members of the Committee may have additional questions for the record, and I ask you to respond to these in writing.

If there is no further business, without objection, the Committee stands adjourned.

[Whereupon, at 11:53 a.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

[The prepared statement of Mr. Coffman follows:]



**Statement of The Honorable Mike Coffman, a Representative  
in Congress from the State of Colorado**

I want to thank Chairman Lamborn and the Sub-Committee for holding this hearing today. It is important to discuss the how the President's budget request will affect the Office of Surface Mining and its mission to productively and responsibly utilize our coal resources.

I also would like to thank all the panelists here today. Your testimony and insights on these matters is greatly appreciated.

As a Member from Colorado, I understand the importance of having a sound and effective mining policy. The Colorado mining industry generates over \$3 billion in sales annually, employs more than 5,000 workers and creates over \$8 billion in total economic activity for the state.

Although coal is no longer the only means to produce energy in this country, it is still an important factor in addressing our domestic needs. The policy direction laid out by OSM and the President's Budget take major steps to restrict the mining industry by not only re-writing a previously negotiated stream buffer rule from 2006 but also forces states to make up budget shortfalls with increased fee collection on industry.

I am concerned the President's budget proposal is focused on executing onerous federal regulations under the Surface Mining Control and Reclamation Act and forcing states to increase fee collection directly from mining companies to make up the lost funding—both of which will have a detrimental impact on mining production in Colorado and in the United States.

Coal is the most widely used, inexpensive source of electricity, which provides approximately 72% of Colorado's electricity needs and nearly half the needs of the entire country. The proposed budget and legislative proposals, including the new stream-buffer rule, will reduce access to affordable energy for many Americans by harming the ability of the coal industry to be a major part of our energy production.

Although the President hopes that renewables will run our country tomorrow, if energy supply from coal is greatly reduced through federal regulation the production cannot yet be replaced by renewables.

During a time when all energy production should be encouraged the President's budget and policy direction seems to be clearly pointed at greatly reducing our coal capacity. The President claims an all of the above approach, but under this budget, coal production is clearly not being supported by the Administration. It should not be the policy of OSM to make production of this affordable and readily accessible energy become even more restricted.

It is my hope as the Representative of the 6th District of Colorado that the Office of Surface Mining will look closely at the effects their policy decisions will have on job creation and energy costs for families. However, after hearing your testimony Mr. Pizarchik, I am convinced this Administration is dead-set on chasing impossible environmental goals by imposing regulations that are costing American jobs and blocking American energy production.

